85-876

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, CLERK

In The
Supreme Court of the United States
October Term, 1985

JON A. VICARS,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipal ordinance can constitutionally require (1) that an individual businessman remain in the business of providing rental housing and (2) that he provide the housing as a public service to specific persons designated for preferential treatment by the municipality.

2. Whether a municipal ordinance which requires the property owner to grant permanent uninvited access to his property to specific persons designated for preferential treatment by the municipality violates the Fifth and Fourteenth Amendment protections against the taking of property without just compensation.

PARTIES BELOW

Petitioner is an individual, Jon A. Vicars. Respondent is the Appellate Department of the Superior Court in and for the County of Alameda. The following ten individuals were the named defendants in the original complaint: Ross Eppler, Sue Blake, Peter Benson, Hillary J. Johnson, Julia Anne Cato, Susan Stone, Wendy Morris, Francisca Suzio, Mary Ann Bridget Lawley, and Brian C. Akers.

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v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINIONS BELOW

The decision of the California Supreme Court denying review of the California Court of Appeal decision denying Vicars' writ of certiorari is unpublished, and is attached as Appendix A. The decision of the California Court of

Appeal denying petitioner's writ of certiorari is unpublished, and is attached as Appendix B. The decision of the Appellate Department of the Superior Court is unpublished, and is attached as Appendix C.

———o———

JURISDICTION

The decision of the Appellate Department of the Superior Court of Alameda County was filed and entered on February 21, 1985. The decision of the Court of Appeal was filed and entered July 8, 1985. The decision of the California Supreme Court denying review was filed August 28, 1985. This Court has jurisdiction pursuant to Section 1257(3) of Title 28 of the United States Code. In addition this Court has just recently agreed to review the case of *MacDonald, Sommer & Frates v. County of Yolo and City of Davis, prob. juris. noted*, 54 U.S.L.W. 3270 (Oct. 21, 1985) (No. 84-2015). This case would be a complementary companion case to *MacDonald* as it involves issues which are similar yet not identical. By granting certiorari to review this case the Court will be able to provide a more complete clarification of the murky area of the law relating to regulatory takings.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution: "[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

City of Berkeley Ordinance 5261-NS, Section 13, is set forth in Appendix H.

STATEMENT OF THE CASE

Petitioner, Jon A. Vicars, has owned since 1982 rental housing located in Berkeley, California, where rent control regulations are presently in effect. Appendix E-1. Vicars no longer wishes to remain in the rental housing business and in order to withdraw from this occupation he, of course, needed to remove his tenants. For this purpose he terminated the month-to-month tenancies of his renters. Appendix E-2. When the renters refused to vacate Vicars filed an unlawful detainer action in the Berkeley-Albany Municipal Court. Appendix E. Some of the tenants responded with demurrers. The demurrers were based on the argument that the Berkeley rent control ordinance did not allow evictions for the purpose of permitting Vicars to withdraw from the occupation of providing rental housing. Appendix D-3. Berkeley Ordinance 5261-NS, Section 13, designates tenants in occupancy of the property to have special protected rights to remain in the property over all other potential tenants, regardless of the interests of the property owner. *See* Appendix H. Arguments on the demurrers were heard on January 17, 1984. The demurrers

were sustained without leave to amend. Appendix D-2.[1] Vicars subsequently appealed to the Appellate Department of the Superior Court where he argued successfully that sustaining the demurrers violated his constitutional rights by requiring him to continue in the rental business against his wishes and forcing him unwillingly to provide access to his property for the housing of persons who had no contractual or property right to occupy the premises.

On October 18, 1984, the Appellate Department of the Superior Court remanded the case to the Municipal Court with instructions to set aside the order sustaining the tenants' demurrers. Appendix D-11. In the opinion of the Appellate Department of the Superior Court, the application of the Berkeley rent control ordinance violated Vicars' rights under the Fifth and Fourteenth Amendments to the United States Constitution. Appendix D-11. However, before the Municipal Court could hear the matter on remand, the tenants and amicus, City of Berkeley, petitioned for a rehearing in light of the California Supreme Court's decision in *Nash v. City of Santa Monica,* 37 Cal. 3d 97 (1984). The Appellate Department of the Superior Court upon reconsideration reversed its earlier decision and affirmed the order sustaining the tenants' demurrers without leave to amend. Appendix C. On January 31, 1985, Vicars filed an application for certification to the Court

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[1] Under California law a demurrer admits the truth of all factual allegations in the complaint. *Martinez v. Socoma Companies, Inc.,* 11 Cal. 3d 394, 399 (1974). As the Appellate Department of the Superior Court affirmed the demurrers, the facts set forth in the complaint must, for purposes of review, be taken as true. *Hoyem v. Manhattan Beach City School District,* 22 Cal. 3d 508, 517 (1978), *Commercial Standard Insurance Co. v. Bank of America,* 57 Cal. App. 3d 241, 246 (1976).

of Appeal with the Appellate Department of the Superior Court. Appendix F. Vicars argued that his circumstances varied significantly from those in *Nash* and involved constitutional considerations not considered in that case, but the application for certification was denied on February 21, 1985.

Vicars, left with no speedy and adequate remedy at law and no right to appeal,[2] filed a petition for certiorari with the California Supreme Court on April 22, 1985. The California Supreme Court transferred the petition to the California Court of Appeal, First Appellate District, which denied the petition on June 7, 1985. On June 14, 1985, a renewed petition for certiorari was filed. On June 21, 1985, the California Supreme Court again transferred the petition to the California Court of Appeal, First Appellate District. The Court of Appeal denied this petition on July 8, 1985. Appendix B. Vicars on July 18, 1985, petitioned the California Supreme Court for review of the Court of Appeal decision. On August 28, 1985, the California Supreme Court denied the petition for review. Appendix A.

The constitutional issues presented in this petition were raised in the appeal to the Appellate Department of the Superior Court and in the petitions to both the California District Court of Appeal and the California Supreme Court. The appellate courts declined to review

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[2] Under California procedure, an appeal from a decision of the Municipal Court is to the Appellate Department of the Superior Court. Cal. Rules of Court, Rule No. 121. Further review by a District Court of Appeal is discretionary. Cal. Rules of Court, Rule No. 62.

them and thereby affirmed demurrers to the complaint. Therefore, this case comes to this Court on the pleadings.

Although the court below did not expressly rule on the question of the availability of damages to Vicars, a claim under the Just Compensation Clause is properly before this Court. Under California law diminution in value of property due to the effect of a valid regulation of property is not compensable. *Agins v. City of Tiburon,* 24 Cal. 3d 266, 276-77 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980). The facial validity of the ordinance in question was established by the California Supreme Court in *Fisher v. City of Berkeley,* 37 Cal. 3d 644 (1984), *prob. juris. noted,* 105 S. Ct. 2653 (May 28, 1985) (No. 84-1538). Therefore, the only remedy available to Vicars was a declaration that the Berkeley eviction for good cause ordinance was unconstitutional as applied to him. The Appellate Department of the Superior Court enforced the ordinance over petitioner's constitutional objections. The California Court of Appeal and Supreme Court by refusing to hear this case denied Vicars the only state remedy that he had. Vicars' constitutional claims are, therefore, properly raised before this Court.

REASONS FOR GRANTING CERTIORARI

This case presents on remarkably simple facts two major issues of federal law which have not been, but should be, settled by this Court. The courts below have ruled that Vicars is required to continue against his will to apply his time, abilities, energy, and resources to the provision

of municipally regulated rental housing. Vicars has asked for no more than to stop participating in an occupation which has become a form of public service and which he now finds to be financially unrewarding, repugnant to his personal principles, and damaging to his health and well-being. He has *not* asked for approval of a new use of the property involved. He has *not* asked to destroy or alter the physical nature of the property. He has *not* asked the municipality to approve any regulated action on his part. He simply decided for reasons both financial and personal to stop participating in the politically controlled housing market of the City of Berkeley and to withdraw his activities from the jurisdiction of a group of public officials whom he believed were abusing him. The tenants of Vicars' property, who had no contractual or property rights to remain on the premises, convinced the California courts to impose the Berkeley ordinance on Vicars in order to require him to continue to provide them with inexpensive housing accommodations. This Court has not decided the extent to which a government mandate can require that an individual against his will continue in an occupation for an unstated period of time.

This case also presents a question which is complementary to the issue accepted for review by this Court in *MacDonald, Sommer & Frates v. County of Yolo and City of Davis, supra.* Both cases present the issue of when a municipal regulation which significantly affects the use and enjoyment of property may be found to constitute a taking of property requiring payment of just compensation under the Fifth and Fourteenth Amendments. In *MacDonald* a taking may be found because the regulation prevents any viable economic use. In contrast in this case,

the taking may be found because the regulation requires one particular use to the exclusion of all others and that particular use requires the property owner to grant uninvited access onto the property by other persons.

Because Vicars was denied the opportunity to amend his pleading to plead the economic hardship imposed on him (*see* Appendix F-2), the question of loss of viable economic use exists in this case only in the tangential form of whether Vicars must be allowed the opportunity to plead a defense to the ordinance based on loss of such use. The issue squarely presented for consideration is whether a regulation which limits the only use of the property to one which requires an uninvited physical invasion by other persons constitutes a taking of the property. Because this issue complements the question presented in *MacDonald*, review of this case at the same time will enable this Court to address on a more comprehensive basis the need for uniformly accepted standards for determining when a level of regulation is constitutionally impermissible.

I

THIS COURT SHOULD CLARIFY THAT VICARS HAS A CONSTITUTIONALLY PROTECTED RIGHT TO WITHDRAW HIS PERSONAL TIME, ABILITIES, AND ENERGIES FROM THE OCCUPATION OF PROVIDING RENTAL HOUSING

It is generally recognized that among the more unfortunate effects of municipal rent control programs is the loss of rental units from the housing market. *See* DeCanio, *Resolving the Housing Crisis*, "Rent Control

Voting Patterns, Popular Views and Group Interests," 301 (M. Bruce Johnson ed. 1982). Owners may withdraw their units for economic reasons, such as loss of a reasonable return, or they may withdraw them as an expression of protest against participation in an economic enterprise in which the benefits of the free market have been replaced with political decision making assigning economic benefits for political reasons. Frequently, as with Vicars, both reasons exist.

This Court has recognized the importance of protecting the freedoms of association and expression to oppose the imposition by initiative of rent control in the City of Berkeley. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 292, 300 (1981). First Amendment protections do not end with the election. Vicars should not be required to support with his time, energy, and abilities a political adventure which he opposes.

Notwithstanding the sensitive constitutional questions involved, municipalities have demonstrated extensive regulatory power to influence a decision to withdraw from the rental housing occupation by making it impossible or economically infeasible to transfer the assests to other productive uses. *See, e.g., Nash v. City of Santa Monica, supra* (refusal to grant a demolition permit). Occasionally, however, certain persons will wish to withdraw from the occupation of providing rental housing without proposing to modify the assets in any way subject to traditional land use regulation. Vicars is such a person. And for such a person as Vicars, even more draconian measures are required to lock him into the occupation of providing rental housing for a public purpose.

This Court in *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), stated:

> "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." *Id.* at 270.

In *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), a case involving rent control, the District of Columbia Circuit indicated:

> "None of this is to say that the landlord may not go out of business entirely if he wishes to do so or that a jury is authorized to inspect his motives if he chooses to commit economic hara-kiri. There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Id.* at 867.

The California courts have not demonstrated the same concern as the federal courts over the constitutional problems associated with preventing a person from withdrawing from the occupation of providing rental housing, and this Court has not clearly defined the scope of the constitutional limitations which bind the ability of municipalities to force persons to remain in selected occupations.

In contrast, the right to *enter* a "common occupation" has been clearly enumerated by this Court as being a protected liberty interest under the Fourteenth Amendment. In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), this Court explained the liberty interest by saying

> "[w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations

> of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

For a person who is already engaged in one occupation, however, the ability "to engage in any of the [other] common occupations of life" is seriously hampered if he or she is prohibited from withdrawing from the current occupation. In Vicars' case, not only his time, abilities, and energy, but also a substantial block of personal resources are tied up in the occupation which the Superior Court is refusing to allow him to leave. If those commitments are not released, his options to pursue another course in life are drastically curtailed.

The California Supreme Court in *Nash, supra,* made light of this important fundamental liberty when it arose under different factual circumstances. The court stated:

> "Nash remains free to minimize his personal involvement by delegating responsibility for rent collection and maintenance to a property manager. He remains free under the ordinance to withhold rental units from the market as they become vacant. And, he remains free to sell his property and invest the proceeds elsewhere. The problem arises from the fact that Nash prefers to do none of these things, but to demolish the building and keep the land beneath as an investment." *Nash v. City of Santa Monica*, 37 Cal. 3d at 103.

Even if there were merit to the California Supreme Court's cavalier suggestion that "delegating responsibility" is the same as withdrawing from an occupation, this

case is not another *Nash* case. Vicars did not ask "to demolish the building." He is not asking to change the physical nature of the property to create a new investment in "the land beneath." Vicars is simply attempting to withdraw from the occupation of providing rental housing to persons designated by the city to receive preference for housing. Before the appellate court, Vicars asked to be allowed to show that the meager income allowed by the regulated rentals did not provide for hiring others in order to "minimize his personal involvement." Appendix F-2. The ruling below precluded Vicars from showing these facts or from showing that the sale of the property occupied by persons paying low, regulated rents was not a reasonable alternative. *Id.*

The constitutional issue presented in this case, however, does not turn on nitpicking reappraisals of the saleability of the property or the availability of surrogate property managers. Unlike Nash, Vicars does not deny that the municipality may preserve the property in its present state. Vicars simply objects to the requirement that he must personally engage in the occupation of making the property available for a public use on behalf of the city. Vicars does not question that the city can condemn his property and transfer it to another person who might willingly do the city's bidding to provide below market cost housing. *Hawaii Housing Authority v. Midkiff*, 467 U.S. —, 104 S. Ct. 2321 (1984). The constitution requires, however, that only the property and *not* the property owner may be put to the public use envisioned by the city.

II

THIS COURT SHOULD CLARIFY THAT A MUNICIPAL ORDINANCE WHICH REQUIRES THE INDIVIDUAL TO PERMIT THIRD PARTIES TO REMAIN ON HIS PROPERTY AGAINST HIS WILL CONSTITUTES A PHYSICAL INVASION OF THE PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), this Court stated:

> "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

In this case the Superior Court's order enforces the Berkeley ordinance which designates Vicars' tenants for special preference to remain on his property against his will. The effect of the Superior Court's order is to mandate the physical invasion of petitioner's premises. Under the rationale of *Penn Central Transportation Company v. City of New York*, a taking has occurred.

This Court has clearly established that a "physical invasion" can be by persons as well as things. The right to exclude others from one's property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

More recently in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court stated:

> "[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Id.* at 426.

In *Loretto*, the owner of an apartment building had brought a class action suit against Teleprompter Manhattan CATV Corporation. The owner alleged that the impact of legislation which allowed cables for cable television to be attached to the apartment building effected a taking of property for which compensation was required. This Court, holding that a taking had occurred stated:

> "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Id.* at 426.

Under this analysis, a permanent physical invasion constitutes a per se taking. If the attachment of cables to an apartment building constitutes a taking, then requiring Vicars to allow third parties who hold under no contractual or property right to remain housed in his apartment buildings is also a taking. In both situations a physical invasion of the owner's property has occurred. Moreover, the physical invasion in this case is more extensive since, in contrast to the mere attachment of cables found unconstitutional in *Loretto*, here entire rental units are being physically occupied and the occupation consumes the property's total potential use.

The physical invasion in this case is permanent. Until the last tenant voluntarily vacates the property its potential uses are severely limited. In *Loretto* the Court observed that under the New York law:

> "So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it." *Id.* at 439.

The same legislation allowed the removal of the cables if the property was no longer being used as a rental building. Even though the cables could be removed at the moment the building ceased to be used for rental purposes, this Court nevertheless concluded that there was a permanent physical invasion. Under the analysis in *Loretto*, a physical invasion is permanent even though the landlord has the opportunity to prevent its continuance. This case goes beyond *Loretto* because Vicars is *not* given an opportunity to prevent the intrusion by discontinuing the present use. He is being required both to allow the physical invasion of his property and to continue the use with which the invasion is associated. Under the standards in *Loretto* a permanent physical invasion has occurred.

It is not a sufficient remedy to suggest that Vicars may retain the right to sell his property, for as this Court noted in *Loretto:*

> "[T]hough the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.* at 436.

This case would appear to be controlled by *Kaiser Aetna* and *Loretto*. Although the initial occupation of Vicars' property occurred with his consent, subject to the terms of the month-to-month tenancies, the Eleventh Circuit has found this distinction to be without force when the terms of the agreement are modified by the governmental action being challenged. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1543 (11th Cir. 1985). This Court should clarify that physical invasions under a government mandate violate constitutional protections without regard to whether they occur without consent or exceed or continue beyond the scope of the original consent. This important issue which has not been settled by this Court is a complementary issue to that being considered in *MacDonald, supra*. Together the two cases provide the Court with the opportunity to clarify the law on regulatory takings arising from both prohibitory and mandatory regulation of property by municipal governments.

CONCLUSION

This case presents two significant constitutional issues which have not been, but should be, settled by this Court to provide guidance to municipalities and to individuals on the constitutional limits on municipal actions in two important policy areas. Through review of this case, the Court can clarify the standards governing the

use of the police power to require an individual both to devote his or her personal time, abilities, and energy to a public use and to permit the occupation of his or her private property for a public use.

For the foregoing reasons, the petition for certiorari should be granted.

DATED: November, 1985.

Of Counsel

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Respectfully submitted,

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APPENDIX A

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

August 28, 1985

I have this day filed Order ———. Review denied. Mosk J. of the opinion that the petition should be granted. In re: No. A031460. Jon A. Vicars vs. Superior Court, Alameda.

Respectfully,
Clerk

877 8-82 4M - OSP

APPENDIX B

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

A031460

Alameda County
Superior Court No. 52930
(Filed July 8, 1985)

Jon A. Vicars,

Petitioner,

vs.

Superior Court, County of Alameda,

Respondent,

Ross Eppler, et al.,
Real parties in Interest.

BY THE COURT:

The petition for writ of certiorari is denied.

Dated July 8, 1985.

LOW, P.J.

APPENDIX C

AMENDED MINUTE Order

SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA

Appellate Dept. ———

Date: 1-29-85 Ken Kawaichi Jerry K. Jue,
Hon. Benjamin Travis, Judge Deputy Clerk
Dawn Girard, Deputy Sheriff Reporter

Counsel appearing
for Plaintiff & APPELLANT

Counsel appearing
for Defendant & RESPONDENT

JON VICARS

Plaintiff,

vs.

ROSS EPPLER, ET AL,

Defendant.

NATURE OF PROCEEDINGS: ACTION No. 1359

Clarification having been requested of the previous minute order of the court, the following order is made in lieu of the order of 1-22-85:

The above entitled matter is called in open court. Oral argument is presented and the matter stands submitted. The following decision is rendered:

1. Rehearing having been granted on November 7, 1984, The court vacates the prior decision reversing the Municipal Court order.

2. No authority having been cited and none found, the objection that the same panel (Judge Schwartz, no longer on the Appellate Division and Judge Bartalini, on sick leave and recovering from an operation) should hear the rehearing as heard the original argument, the objection is overruled. (California Rules of Court, Rule 141).

3. The order of the Municipal Court sustaining the demurrer without leave to amend is affirmed.

4. Remittitur to issue.

Copies of this minute order mailed this date to:

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THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
APPELLATE DEPARTMENT

JON VICARS,

Plaintiff and Appellant,

vs.

ROSS EPPLER, et al,

Defendant and Respondents.

REMITTITUR
CIVIL NO. 1359

On Appeal from the Municipal Court of the
Berkeley-Albany Judicial District

Municipal Court No. 52930
(Filed February 21, 1985)

And now this day, this cause having been called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered comes now the Court and orders that the order of the Municipal Court sustaining the demurrer without leave to amend of the above-named Municipal Court in this action be and the same is hereby affirmed. Respondent to recover costs on appeal.

KAWAICHI, P. J. TRAVIS, J. GIRARD, J.

Appellant's Application for Certification to the Court of Appeal was filed January 31, 1985 and was denied February 21, 1985.

KAWAICHI, P. J. TRAVIS, J. GIRARD, J.

I Rene C. Davidson County Clerk of the Superior Court of the State of California in and for the County of

Alameda do hereby certify that the foregoing is a true and correct copy of an original judgment entered in the above entitled action on the 21st day of February, 1985 and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office this 21st day of February 1985.

RENE C. DAVIDSON, County Clerk

By /s/ Geri Solberg, Deputy

APPENDIX D

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

APPELLATE DEPT. ——

Date Oct. 19, 1984 — Hon. Howard L. Schwartz, Judge; Andrea Carney, Deputy Clerk
Richard Bartalini, Deputy Sheriff — Reporter
Ken Kawaichi

Counsel appearing for Plaintiff

Counsel appearing for Defendant

JON VICARS,

Plaintiff & Appellant,

vs.

ROSS EPPLER,

Defendant & Respondent.

NATURE OF PROCEEDINGS: APPEAL

ACTION No. 1359
Municipal No. 52930

The above entitled matter having been submitted on October 19, 1984, comes now the court and makes the following order:

The inferred Judgment of Dismissal is reversed and the case is remanded to the Trial Court with instructions to set aside its Order Sustaining Demurrer with Prejudice, to overrule said Demurrer and conduct further proceedings not inconsistent with this opinion. Judge Schwartz and Judge Bartalini concurring. Judge Kawaichi concurring in the result of reverse and remand but not on the

constitutional grounds relied on by the majority. Dissenting opinion on file.

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
APPELLATE DIVISION

No. 1359

JON A. VICARS,

Plaintiff, Appellant,

vs.

ROSS EPPLER, et al.,

Defendants, Respondents.

OPINION
(Filed October 19, 1984)

The technical issue on this appeal is whether the Trial Court erred in sustaining Defendant's demurrer with prejudice. The underlying legal issue is whether Berkeley's

rent control Ordinance, denominated Tenants Rights Amendments Act of 1982 and its forerunner, the Rent Stabilization and Eviction for Good Cause Ordinance, enacted June 3, 1980, prohibits Defendants' eviction through an unlawful detainer proceeding on the ground of Plaintiff landlord's desire to remove the premises from the rental housing market, a ground of eviction not recognized by the Ordinance.

This case arises under the following pertinent facts:

Plaintiff served defendants with a 30-day notice to vacate the premises, otherwise valid under CCP 1161.1, stating as the reason his desire to go out of the rental housing business. This occurred after plaintiff had been ordered by the Berkeley Rent Board under the said rent control ordinance to reduce his rents and to make substantial refunds to tenants. Defendant tenants (four of them) demurred to Plaintiff's Unlawful Detainer Complaint, filed after their failure to vacate, on the ground that the Berkeley ordinance did not provide for withdrawal of property from the rental housing market as a ground of eviction. Part B, Section 13.a prohibits recovery of possession by a landlord ". . . unless said landlord shows existence of one of the following grounds: . . .":

(1) Failure to pay rent

(2) Violation of material terms of the lease

(3) Tenant allowed or caused substantial damage

(4) Tenant refused to agree to a new rental agreement upon expiration of the old one.

(5) Tenant continues to destroy peace and quiet of other occupants

(6) Tenant has refused landlord access to the unit

(7) Landlord seeks in good faith to undertake substantial repairs necessary for compliance with law.

(8) Landlord seeks to remove the rental unit from the market for demolition, after obtaining permits

(9) Landlord seeks possession for his own use as a principle residence for himself, spouse, child or parent,

(10) Tenant fails to vacate under a temporary rental agreement after landlord sought to undertake repairs on tenant's original residence.

Section 13.b provides tenant with a defense in any action for possession of a rental unit if landlord fails to specify "good cause as listed" in Section 13.a.

Tenants' demurrers were sustained "with prejudice." We deem said Order sustaining demurrer the equivalent of a Judgment of Dismissal after an Order Sustaining demurrer without leave to amend. We find Plaintiff's voluntary dismissal and other procedural irregularities to be diminimus (sic) in light of the parties' stipulation at oral argument that the constitutional validity of Section 13.a as applied in this case was properly before us. In order to reduce needless multiple litigation it is desirable from the standpoint of the litigants and the administration of justice that the Court accept the stipulation and decide the essential issue on its merits. See *Conaway v Conaway*, (1963) 218 CA2d 427, 428 and *California State Employees Association vs. California*, (1973) 32 CA3d 103, 106.

A threshold constitutional issue herein is whether Berkeley may limit the substantive grounds for eviction in unlawful detainer actions in a manner which conflicts

with the State statutory scheme governing unlawful detainer proceedings as contained in *CCP* 1161, et sec. (sic), or to put it another way, whether state law preempts the field of grounds of unlawful detainer actions to the exclusion of local authority. This question has not been decided by case authority in California. *Birkenfeld v. City of Berkeley,* (1976) 17 C3d 129, held the Ordinance in effect at that time to be void by reason of a conflict between its procedural provisions for the obtaining of a certificate of eviction from the City and State law occupying the field of unlawful detainer procedure. At 136, 151-52. In dicta the Court appeared to state that it would uphold the City's attempt to restrict the substantive grounds for eviction as a reasonable means of enforcing rent ceilings. *Supra* at 136, 148, 152.

The constitutional validity of the Ordinance, including the preemption issue, is now before the California Supreme Court in *Fisher v City of Berkeley,* (1983) A010460, 1 Civ. 52332 filed October 24, 1983, hearing granted December 22, 1983.

Some states have invalidated eviction control local ordinances on the basis of state preemption. See *Burton v Hartford,* (1956) 127 A2d 251 (Conn.), *Miami Beach v Fleetwood Hotel, Inc.,* (1972) 261 So. 2d 801 (Fla.), *Huebeck v Baltimore,* (1954) 107 A2d 99 (Md.), *Marshal House, Inc. v Rent Review & Grievance Board,* (1970) 260 NE 2d 200 (Mass.), *Brunetti v New Milford,* (1975) 350 A2d 19 (N.J.), *F.T.B. Corp. v. Goodman,* (1949) 89 NE 2d 865 (N.Y.). In light of the current uncertainty of California law on the eviction grounds preemption issue we decline to decide this case on that ground.

A municipal ordinance, enacted within the legislative power of a municipality, is to be construed with the same effect as if it had been adopted by the Legislature, *Brown v. City of Berkeley,* (1976) 57 C3d 223, 231, and is therefore cloaked with a presumption of validity. It must be upheld "... unless its unconstitutionality clearly, positively and unmistakenly appears." *Hale v Morgan,* (1978) 22 C3d 388, 494.

Due Process

The Fourteenth Amendment of the *United States Constitution* and the due process clause (Art. I, § 7 (a); Art. I, § 15) of the *California Constitution* prohibit the deprivation of life, liberty and *property* without due process of law (emphasis added). Legislative acts which are oppressive, unreasonable or not reasonably related to the object of the legislation violate the due process clause. See *Hale v Morgan,* supra at 399.

Substantive due process, on the other hand, deals with protection from arbitrary legislative action even though the person whom it is sought to deprive of his life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation reasonably applied, i.e. the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained." (citations) *Gray v Whitmore,* (1971) 17 CA3d 1, 21.

Substantive due process is satisfied if the legislative regulation is ". . . neither arbitrary nor discriminatory."

Agricultural Labor Relations Bd. v Superior Court, (1976) 16 C3d 392, 410.

We accord the rent control ordinance on its face the validity to which it appears to be entitled under the dicta of *Birkenfeld v. City of Berkeley,* (1976) 17 C3d 129, 149, 152, in light of the 1982 procedural amendments. However, where a statute may be subject to both constitutional and unconstitutional applications, Courts evaluate the propriety of the sanction on a case-by-case basis. See *Hale v Morgan,* supra at 404.

The effect of upholding the validity of the application of the Ordinance in this case is to prevent Plaintiff from ceasing to rent residential property. Unless he choses (sic) to start the entire unlawful detainer procedure anew and to base his eviction on demolition of the building he is forced to continue as a residential landlord in Berkeley or to sell his property. Such an infringement on the customary and traditional rights of owners of real property, while not amounting to involuntary servitude under the Thirteenth Amendment of the *United States Constitution* or *Art I,* Sec. 18 of the *California Constitution,* constitutes an arbitrary, capricious and unreasonable infringement of Plaintiffs substantive due process rights as a property owner. Such infringement is not reasonably related to or necessary to effectuate the presumed valid objectives of the rent control statutory scheme.

While there is abundant authority upholding rent control ordinances in the United States and at least one state, Pennsylvania, has upheld the inclusion of eviction control provisions as a means of implementing valid rent ceiling or control provisions, See *Warren v Philadelphia,* (1955)

115 A 2d 218, no case authority has been found which upholds such an extreme restriction on the landlord's otherwise valid exercise of an owner's prerogative to offer or not offer his property for rent to tenants. *Birkenfeld,* supra, recognized the need for controlling the substantive grounds for eviction in order to assure compliance with maximum rent limits. 17 C3d at 152.

In this case it does not promote compliance with maximum rent controls to prohibit Plaintiff from removing his property from the residential housing market. If he were to demolish the building, as he may properly do under the Ordinance, or to convert the building to commercial, industrial or non-housing use, assuming he could do so in compliance with applicable zoning and other codes, the property would not be available to residential tenants nor covered by the ordinance at all. The result to the City and to residential tenants would be the same as that which Plaintiff is here attempting to accomplish, i.e., the removal of the property from the residential housing market. Any attempt to force the landlord in these circumstances to either sell his property, demolish it or remain in the business of renting residential property is, in our opinion, arbitrary, capricious and not reasonably related to a valid legislative purpose. The application of the ordinance in this case in a manner which prohibits plaintiff from withdrawing his property from the rental market violates Plaintiff's substantive due process rights under the United States and California Constitutions.

The Court, in *Birkenfeld,* supra, recognized by implication, the unreasonableness of the Ordinance in barring a landlord from withdrawing property from the market, in dicta at 148: ". . . and we assume for present purposes that the effect of the provision is simply to prohibit the

eviction of a tenant who is in good standing at the expiration of the tenancy *unless the premises are to be withdrawn from the rental housing market . . .*" (emphasis added)

Equal Protection

"'The Equal Protection Clause . . . den(ies) to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumscribed shall be treated alike.'" (citations) *Southern Ca. Assn. of Seventh Day Adventists v Franchise Tax Bd.,* (1975) 47 C3d 207, 213.

In this case Plaintiff is a member of the class of residential landlords. Yet he, as a result of the Trial Court's ruling, will be prohibited from withdrawing from the residential property rental business because he does not choose to demolish the building or devote it to some other non-residential use while other members of the class may go out of that same business if they demolish or remodel their building for non-residential use. Is there any rational distinction, necessary to promote the public policy behind the Ordinance, which justifies such disparate treatment of members of the same class? We think not.

The policy behind rent control is to maximize available rental housing at affordable rent. That policy is neither promoted nor discouraged by treating residential landlords who desire to withdraw their property from the housing market differently. If a landlord can remove his

property from the pool of units available for rent in the City by demolishing the building, why should not a landlord who desires to use his building for a purpose other than residential housing or to keep it vacant for that matter if he desires to do so, not be entitled to the same rights and treatment?

We perceive no reasonable differentiation fairly related to the object of the regulation which justifies the discrimination against plaintiff resulting from the Trial Court's application of the Ordinance to him in this case. See *Hays v Wood*, (1979 25 C3d 772, 786. Such discriminatory application is a violation of Equal Protection Clauses of the United States and California Constitutions.

It can be argued that to prohibit the landlord from evicting all tenants in order to devote his property to some non-residential rental use or to no use at all amounts to a physical occupation of his property and a "taking" by governmental authority without just compensation. See *Loretto v. Teleprompter Manhattan, CATV Corp.*, (1981) 458 US 419. While *Loretto* condemned the forced physical attachment of TV cables to the building, the forced continued occupancy of rental units by tenants is not in effect unlike a "physical taking" and is certainly a physical occupation of the premises.

> "In short, when the 'character of the governmental action,' *Penn. Central,* 438 US, at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto,* supra, at 434-35.
>
> "Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space

by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." Id at 436.

While *Loretto* can be factually distinguished on the ground it involved a physical attachment of wires to the building, the effect of barring eviction in this case is to permit what may be permanent occupation of the building by tenants to the exclusion of traditional landlord's right to possession. Such an effect could amount to a "taking of property without just compensation under the Fifth and Fourteenth Amendments of the Constitution under *Loretto.*

It may be argued that it is necessary to prohibit plaintiff from withdrawing from the property rental business in order to prevent spurious eviction proceedings by landlords who fraudulently represent their true intentions in order to rerent to new tenants at rents violative of rent ceilings after regaining possession. The comprehensive Berkeley Ordinance provides civil remedies, including penalties as well as criminal sanctions for such conduct. Therefore, it is not necessary to violate Plaintiff's due process and equal protection rights, as set forth above, in order to safeguard the purposes of the Ordinance. See *Dobkins v. Hoffman,* (1983) 148 C3d 833, 837-838.

The inferred Judgment of Dismissal is reversed and the case is remanded to the Trial Court with instructions to set aside its Order Sustaining Demurrer with Prejudice, to overrule said Demurrer and conduct further proceedings not inconsistent with this opinion.

Dated: October 18, 1984

/s/ H. L. Schwartz
PRESIDING JUDGE

I Concur:

/s/ Richard Bartalini
Associate Judge

I concur in the result of reverse and remand but not on the constitutional grounds relied on by the majority. See dissenting opinion filed herewith.

/s/ Ken M. Kawaichi
Associate Judge

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA
APPELLATE DIVISION

No. 1359

JON A. VICARS,

Plaintiff, Appellant,

vs.

ROSS EPPLER, et al.,

Defendants, Respondents.

SEPARATE CONCURRING OPINION BY JUDGE KAWAICHI
(Filed October 19, 1984)

I concur in the result because the order of the Municipal Court is without legal meaning. The term, "with prejudice" indicates it is intended as a final order, but does not speak to the question of whether the demurrer was granted with or without leave to amend. See 3 Witkin, CALIFORNIA PROCEDURE, 2408 ff. Moreover, the voluntary dismissal by plaintiff, in place of a more conventional request that the Court either clarify or dismiss, operates to deny the plaintiff the right to dismiss

under C.C.P. 581(1). *Goldtree vs. Spreckels,* 135 Cal. 666 (1902); *Wells vs. Marina City Properties,* 29 Cal. 3d 781 (1981). Under these circumstances, the trial court must correct and clarify the record to present the constitutional issue in a ripe manner. Oral representations by the attorneys that the constitutional issue is properly presented cannot make it so.

Appellant contends that Berkeley's statutory scheme violates the Thirteenth Amendment's proscription of involuntary servitude (also, Cal.Const., Art.I,Sec.18). The Berkeley Act, however requires no personal services. A landlord can hire a manager or contract for services with one of the tenants. *Marcus Borwin vs. Feldman,* 256 U.S. 170 (1920). Further, a landlord may alter or terminate business. If Appellant wants to go out of the business of renting units, the property can be sold or occupied by the landlord, spouse, child or parent. Furthermore, the premises can be demolished after permits are obtained. Involuntary servitude in the accepted legal sense is not present.

Appellant also raises a due process argument. Apparently the argument is that the ordinance, in regulating the rental housing, constitutes a taking of property without due process.

Reduction of the value of the property is not alleged. Nor is any permanent invasion of the property alleged. The restrictions are not alleged to be, nor are they in fact, permanent in nature. See *Loretto vs. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419(1982). If Appellant seriously contends there is a partial or total condemnation of his property, he has adequate remedies for that taking outside the statutory scheme and outside this lawsuit.

Appellant contends that a city ordinance cannot create exclusive grounds for pleading a cause of action in unlawful detainer. Both sides have cited *Birkenfeld vs. City of Berkeley,* 17 Cal.3d 129(1976) to support their views on this issue. The legal effect of *Birkenfeld,* setting aside the dicta for the moment, was to liberalize the test for validating rent control measures. The old "emergency" doctrine was liberalized to a "compelling state interest" test. The language incorporated in the ordinance sufficiently sets forth a compelling state interest. See *Marcus Brown vs. Feldman,* 256 U.S. 170(1921); *Block vs. Hirsch,* 256 U.S. 135(1921); *Chastleton vs. Sinclair,* 264 U.S. 543 (1924). Appellant has neither cited cases nor raised arguments to support his interpretation of *Birkenfeld.*

The majority believes that the ordinance violates both the due process and equal protection clauses. I disagree.

I do not believe the ordinance is unduly restrictive. The legislative finding in the ordinance is that there is an emergency in the rental housing area in Berkeley. The regulation of unlawful detainers is merely the mechanism by which to accomplish the legitimate public purpose of providing adequate rental housing to the public. While some may disagree with the purpose of philosophy, the legislative decision is clearly supported within the ordinance and is neither arbitrary nor capricious. It is, in fact, as this case exemplifies, logically and reasonably related to the purpose intended.

The facts of this case indicate that the Plaintiff only arrived at his decision to "go out of the business of renting property" after he was denied a rent increase by the rent control board. It is suggested by Defendants that the defense of retaliatory eviction is appropriate and applicable

under these circumstances. Given the background, it appears that it is not a lack of due process being complained of, but an excess. It is not the deprivation of rights, but a disagreement with the legislative determination.

The majority, using as a class, "residential landlords", declares the class is deprived of equal protection because the Plaintiff must demolish the buildings or devote it to other nonresidential use. But the majority overlooks the simple fact that the Plaintiff can sell or trade. Moreover, the majority neither discusses nor distinguishes *Marcus Brown vs. Feldman,* 256 U.S. 170(1921), *Block vs. Hirsch,* 256 U.S. 135(1921) or *Chastleton vs. Sinclair,* 264 U.S. 543 (1924).

In conclusion, I think the majority has not marshalled facts or law to meet and overcome:

1. The presumption of validity. *Hale vs. Morgan,* 22 Cal.3d 388(1978).

2. The lack of any taking. *Loretto vs. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419(1982).

3. The specific legislative findings within the ordinance.

4. The alternatives available to the Plaintiff.

5. The weak factual and procedural posture of this case as a vehicle to meaningfully examine the constitutional issues.

Dated: October 18, 1984.

/s/ Ken M. Kawaichi
Judge of the Superior Court

APPENDIX E

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BERKELEY-ALBANY MUNICIPAL COURT,
STATE OF CALIFORNIA, COUNTY OF ALAMEDA

No. 52930

JON A. VICARS,

Plaintiff,

vs.

ROSS EPPLER, SUE BLAKE, PETER BENSON, HILARY J. JOHNSON, JULIA ANNE CATO, SUSAN STONE, WENDY MORRIS, FRANCESCA SUZIO, MARY ANN BRIDGET LAWLEY, BRIAN C. AKERS, does 1 through 50,

Defendants.

UNLAWFUL DETAINER

(Filed December 11, 1983)

FIRST CAUSE OF ACTION

1. Plaintiff, Jon A. Vicars alleges that he is an individual over the age of 18 years and the owner of the premises commonly known as 2431-2435 Jefferson Street, in the City of Berkeley, County of Alameda.

2. Defendants' tenancies are subject to the local rent control ordinance of the City of Berkeley, entitled City of Berkeley Rent Stabilization Ordinance of 1982.

Plaintiff has met all applicable requirements of the Ordinance.

3. The above named defendants and each of them are in possession of the premises commonly known as 2431-2435 Jefferson Street, Berkeley, California.

4. Plaintiff terminated the month to month tenancy of the above named defendants by means of service of thirty day notice to each of them on or about November 5, 6, 7, 1983, and that 30 day period, plus an additional 5 day period for mailing, in those cases of service by posting and mailing.

5. Said 30 day notice period has expired and the above named defendants and each of them, refuse to restore possession of the premises to the plaintiff.

6. The above named defendants and those fictitiously named, act in concert in occupying the premises and refusing to restore possession of the premises to the plaintiff.

SECOND CAUSE OF ACTION TO DEFENDANT ROSS EPPLER ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. On or about June 8, 1983 defendant Ross Eppler agreed to rent apartment "A" in the above premises for a month to month tenancy at a rent of $300./month payable monthly, due on the first of the month. This written agreement was made with the plaintiff. A copy of this agreement is attached and labeled Exhibit "A1".

3. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant failed to comply with the requirements of that notice by

that date. A copy of the notice is attached and labeled Exhibit "A2".

4. The fair rental value of the premises is $10.00 per day.

THIRD CAUSE OF ACTION TO
DEFENDANT SUE BLAKE ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1980, defendant Sue Blake agreed to rent apartment "B" in the above premises for a month to month tenancy at a rent of approximately $180.00 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified, with the rent being $211.73 per month.

4. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "B1".

5. The fair rental value of the premises is $7.06 per day.

FOURTH CAUSE OF ACTION TO
DEFENDANT PETER BENSON ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1977 defendant Peter Benson agreed to rent apartment "C" in the above premises for a month to month tenancy at a rent of $145. payable monthly, due

on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified to the rent being $189.32 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting a copy on the premises that date and mailing a copy to the defendant at the premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "C1".

5. The fair rental value of the premises is $6.31 per day.

FIFTH CAUSE OF ACTION TO
DEFENDANT HILARY J. JOHNSON ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. On or about April 1, 1983 defendant Hilary J. Johnson agreed to rent apartment "D" in the above premises for a month to month tenancy at a rent of $300. payable monthly, due on the first of the month. This written agreement was made with the plaintiff. A copy of this agreement is attached and labeled Exhibit "D1".

3. In June, 1983 this agreement was modified with the rent being $240. per month.

4. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant

failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "D2".

5. The fair rental value of the premises is $8.00 per day.

SIXTH CAUSE OF ACTION TO
DEFENDANT JULIA ANNE CATO ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1976 defendant Julia Anne Cato agreed to rent apartment "E" in the above premises for a month to month tenancy at a rent of $141.50 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $188.84 per month.

4. On November 5, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 6, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "E1".

5. The fair rental value of the premises is $6.29 per day.

SEVENTH CAUSE OF ACTION TO
DEFENDANT SUSAN STONE ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1976 defendant Susan Stone agreed to rent apartment "F" in the above premises for a month to month tenancy at a rent of $141.50 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $186.74 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting a copy on the premises on that date and mailing a copy to the defendant at the premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice. A copy of the notice is attached and labeled Exhibit "F1".

5. The fair rental value of the premises is $6.22 per day.

EIGHTH CAUSE OF ACTION TO DEFENDANT WENDY MORRIS ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1981 defendant Wendy Morris agreed to rent apartment "G" in the above premises for a month to month tenancy at a rent of $225. payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $236.25 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting a copy on the premises that date and mailing a copy to the defendant at the

premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice. A copy of the notice is attached and labeled Exhibit "G1".

5. The fair rental value of the premises is $7.87 per day.

NINTH CAUSE OF ACTION TO
DEFENDANT FRANCESCA SUZIO ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1980 defendant Francesca Suzio agreed to rent apartment "H" in the above premises for a month to month tenancy at a rent of $250. payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $262.50 per month.

4. On November 6, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in that notice expired on December 7, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "H1".

5. The fair rental value of the premises is $8.75 per day.

TENTH CAUSE OF ACTION TO
DEFENDANT MARY ANN BRIDGET LAWLEY ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. During 1980 defendant Mary Ann Bridget Lawley agreed to rent apartment "J" in the above premises for a month to month tenancy at a rent of approximately $190.75 payable monthly, due on the first of the month. This agreement was orally made with the plaintiff's predecessor in interest.

3. In January 1983 the above agreement was modified with the rent being $200.78 per month.

4. On November 7, 1983 a 30 day notice to quit was served on the defendant by posting copy on the premises that date and mailing a copy to the defendant at the premises on the same date. The period stated in that notice expired on December 13, 1983 and the defendant failed to comply with the requirements of that notice. A copy of the notice is attached and labeled Exhibit "J1".

5. The fair rental value of the premises is $5.69 per day.

ELEVENTH CAUSE OF ACTION TO
DEFENDANT BRIAN D. ACKERS (sic) ONLY

1. Plaintiff incorporates herein paragraphs 1 and 2 of the first cause of action as though fully set forth.

2. On or about August 1982 defendant Brian D. Akers agreed to rent apartment "K" in the above premises for a month to month tenancy at a rent of $297. payable monthly, due the first of the month. This written agreement was made with the plaintiff.

3. In July 1983 the above agreement was modified with the rent being $300. per month.

4. On November 6, 1983 a 30 day notice to quit was served on the defendant in person. The period stated in

that notice expired on December 7, 1983 and the defendant failed to comply with the requirements of that notice by that date. A copy of the notice is attached and labeled Exhibit "K1".

5. The fair rental value of the premises is $10.00 per day.

PRAYER

1. Plaintiff demands possession from each of the defendants and these fictitiously named, under the provisions of California Civil Code, Section 1946; the provisions of United States Constitution, Amendments 13 and 14, under the provisions of the California Constitution, Article I, section 7(a), in order to go out of business.

2. Plaintiff remits to the jurisdictional limit of the court.

3. Plaintiff requests:

a. Possession of the premises.

b. Costs incurred in this proceeding.

c. Damages according to proof as to each cause of action.

d. Reasonable attorney fees as to the second, fifth and eleventh causes of action.

e. Forfeiture of the rental agreements with each of the defendants.

4. Such other relief as the court feels just and proper.

DATED: December 14, 1983

/s/ Michael C. Ciraolo
Attorney for Plaintiff

VERIFICATION

I am the plaintiff in this proceeding and have read this complaint. I declare under penalty of perjury, and upon information and belief, under the laws of the State of California that this complaint is true and correct.

DATED: December 14, 1983 at Berkeley, California.

/s/ Jon A. Vicars
Jon A. Vicars, Plaintiff

APPENDIX F

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, APPELLATE DEPARTMENT

No. 1339

(BAMC #52930)

JON VICARS,

Plaintiff and Appellant,

vs.

ROSS EPPLER, et. al.,

Defendants and Respondents.

APPLICATION FOR CERTIFICATION TO THE COURT OF APPEAL

(Filed January 31, 1985)

TO: THE HONORABLE KEN M. KAWAICHI, PRESIDING JUDGE, AND THE HONORABLE ASSOCIATE JUDGES OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF ALAMEDA.

Appellant, JON VICARS, hereby applies to this court for certification of this case and its records to the Court of Appeal. This application is made pursuant to Rule 63 of the California Rules of Court. This application is made upon the grounds that questions of law need to be settled and in order to secure uniformity of decision.

ARGUMENT IN SUPPORT OF APPLICATION FOR CERTIFICATION

This court reversed itself from its previous ruling upon a petition for rehearing filed by the defendants and respondents, as well as by amicus, CITY OF BERKELEY. The principle case cited in the briefs for rehearing was the *Nash* case. (*Nash v. City of Santa Monica,* (1984) 37 C3d 97, 207 CR 285.)

As submitted in the attached declaration of counsel, the *Nash* case has been appealed to the United States Supreme Court. Therefore it is now being subject to further review.

Furthermore, the standards applied in the *Nash* case, i.e., rational relationship, were premised upon factual determinations after trial. Here, having had no trial, appellant is denied any evidence to determine if the *Nash* standards have been met. In *Nash* the Supreme Court mentioned various options available to Mr. Nash so that he would not be in an involuntary servitude situation. Those options were sale of the property or hiring a management company. Appellant has been denied the opportunity to present any evidence as to the saleability of the property or whether a management company would even be willing to handle the property.

Evidence as to secondary issues of sufficient income to pay a management company or meet mortgage payments which are related to the Supreme Court's rational relationship test could not be submitted.

This ruling creates a basic due process violation and denial of appellant's right to a hearing and presentation of evidence. The manner in which the demurrer has been

sustained under the Berkeley Rent Control Ordinance has caused this result.

It is submitted that these federal constitutional questions of involuntary servitude and denial of due process are important questions of law which need to be settled, and which remain without answer at this time.

Further, as this court is aware from previously submitted briefs and arguments in this case, there is now pending both before the First Appellate District of the Court of Appeal (number therein A028413 and Alameda County Superior Court #582948-6) a related civil rights matter. In *Vicars v. City of Berkeley, et al*, the Court of Appeal has issued its Alternate Writ of Mandate against the Alameda County Superior Court ordering it to allow Vicars to proceed if possible in accord with *Nash* (attached hereto as Exhibit "A").

Hearing therein on the subsequently filed demurrer to the alternative writ is now scheduled for March 5, 1985 (see Exhibit "B" attached hereto), before Division 5 of the Court of Appeal, First Appellate District.

There is the potential that the Court of Appeal may again reach a different decision from this court, as it did earlier on similar issues, and it is clear that there is no uniformity of decision at this time on the application of *Nash*. It is thus requested that this matter be certified to the Court of Appeal for further review.

Respectfully submitted,

Dated: 31 January 1985

/s/ Michael C. Ciraolo
Attorney for Appellant,
Jon Vicars

APPENDIX G

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

APPELLATE DEPT.

Date: Feb. 21, 1985

Hon. Ken Kawaichi, Judge; Geri Solberg, Deputy Clerk; Benjamin Travis, Deputy Sheriff; None Reporter; Dawn B. Girard.

JON VICARS,

Plaintiff and Appellant,

vs.

ROSS EPPLER, et al.,

Defendant and Respondents.

NATURE OF PROCEEDINGS:

APPELLANT'S APPLICATION FOR CERTIFICATION TO THE COURT OF APPEAL

ACTION NO. 1359

In the above entitled action, the Court having rendered judgment on January 29, 1985, and the Appellant having submitted an Application for Certification to the Court of Appeal, filed January 31, 1985, and the same having been taken under advisement and fully considered, comes now the Court and orders: Said application for Certification to the Court of Appeal is DENIED.

Copies of this minute order mailed this date to:

CIRAOLO & CIRAOLO
3306 Harrison Street
Oakland, CA 94611

Samuel E. Trosow
1950 Addison Street, #200
Berkeley, CA 94704

Roger Purdon
2259 Derby Street
Berkeley, CA 94705

City of Berkeley
Frederick Bray
City Attorney
2180 Milvia Street
Berkeley, CA 94704

APPENDIX H

BERKELEY RENT STABILIZATION AND EVICTION FOR GOOD CAUSE ORDINANCE

Section 13. GOOD CAUSE REQUIRED FOR EVICTION

a. No landlord shall be entitled to recover possession of a rental unit covered by the terms of this Ordinance unless said landlord shows the existence of one of the following grounds:

(1) The tenant has failed to pay rent to which the landlord is legally entitled pursuant to the lease or rental agreement and under the provisions of state or local law, unless the tenant has withheld rent pursuant to applicable law; and said failure has continued after service on the tenant of a written notice setting forth the amount of rent then due and requiring it to be paid, within a period, specified in the notice, of not less than three days.

(2) The tenant has continued, after written notice to cease, to substantially violate any of the material terms of the rental agreement, except the obligation to surrender possession on proper notice as required by law, and provided that such terms are reasonable and legal and have been accepted in writing by the tenant or made part of the rental agreement; and provided further that, where such terms have been accepted by the tenant or made part of the rental agreement subsequent to the initial creation of the tenancy, the landlord shall have first notified the tenant in writing that he or she need not accept such terms or agree to their being made part of the rental agreement.

(3) The tenant has willfully caused or allowed substantial damage to the premises beyond normal wear and

tear and has refused, after written notice, to pay the reasonable costs of repairing such damage and cease damaging said premises.

(4) The tenant has refused to agree to a new rental agreement upon expiration of a prior rental agreement, but only where the new rental agreement contains provisions that are substantially identical to the prior rental agreement, and is not inconsistent with local, state and federal laws.

(5) The tenant has continued, following written notice to cease, to be so disorderly as to destroy the peace and quiet of other tenants or occupants of the premises.

(6) The tenant has, after written notice to cease, refused the landlord access to the unit as required by state or local law.

(7) (A) The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to undertake substantial repairs which are necessary to bring the property into compliance with applicable codes and laws affecting the health and safety of tenants of the building or where necessary under an outstanding notice of code violations affecting the health and safety of tenants of the building, and where such repairs cannot be completed while the tenant resides on the premises.

(B) Where such repairs can be completed in a period of sixty or fewer days, and the tenant, within thirty days after the service of a notice of termination of his or her tenancy, agrees in writing to vacate the premises during the period required to complete the repairs at no charge to the landlord, other than abatement of the obligation to

pay rent for the premises during the period required to complete the repairs, the landlord may not recover possession pursuant to this Subsection 13.a.(7) unless the tenant shall fail or refuse to vacate the premises in accordance with such agreement.

(C) Where the landlord owns any other residential rental units in the City of Berkeley, and any such unit is vacant and available at the time of service of the written notice terminating the tenancy, or at any time thereafter until the earlier of the tenant's vacating the premises or the entry of a judgment by a court of competent jurisdiction awarding possession of the premises to the landlord, the landlord shall, as a condition of obtaining possession pursuant to this Subsection 13.a.(7), notify tenant in writing of the existence and address of each such vacant rental unit and offer tenant the right, at the tenant's option:

(1) to enter into a rental agreement (to be designated as a "temporary rental agreement") on any available rental unit which the tenant may choose, at a rent not to exceed the lesser of the lawful rent which may be charged for such available rental unit or the lawful rent in effect, at the time of the notice of termination of tenancy, on the unit being vacated, said rental agreement to be for a term of the lesser of ninety days or until completion of repairs on the rental unit being vacated by tenant, or;

(2) to enter into a new rental agreement or lease for such available rental unit at a rent not to exceed the lawful rent which may be charged for such available rental unit.

(D) Where the landlord recovers possession under this subsection 13.a.(7), the tenant must be given the right of first refusal to re-occupy the unit upon completion of the required work. In the event landlord files an application for an individual rent adjustment within six months following the completion of the work, the tenant shall be a party to such proceeding the same as if he or she were still in possession, unless the landlord shall submit, with such application, a written waiver by the tenant of his or her right to re-occupy the premises pursuant to this subsection.

(8) The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.

(9) The landlord seeks in good faith to recover possession for his or her own use or and occupancy as his or her principal residence, or for the use and occupancy as a principal residence by the landlord's spouse or by the landlord's child-or parent. For the purposes of this subsection 13.a.(9), the term landlord shall be defined as the owner of record, as of the time of giving of a notice terminating the tenant's tenancy, and at all times thereafter to and including the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord, holding at least a 50% interest in the property and shall not include a lessor, sublessor, or agent of the owner of record. The landlord may not recover possession under this subsection 13.a.(9) if a comparable unit was, at the time of the landlord's decision to seek to recover possession of the

rental unit, already vacant and available in the property, or if a comparable unit thereafter becomes vacant in the property at any time until the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord. In an action by or against the tenant, evidence that a comparable unit was vacant and available in the property within ninety days prior to the date of a notice terminating the tenant's tenancy shall create a presumption that such unit was vacant and available at the time of the landlord's decision to seek to recover possession of the premises. "Presumption" means that the Court must find the existence of the presumed fact unless and until the contrary is proven by a preponderance of the evidence.

(10) A landlord or lessor seeks in good faith to recover possession of the rental unit for his/her occupancy as a principal residence, where the landlord or lessor has previously occupied the rental unit as his/her principal residence and has the right to recover possession of the unit for his/her occupancy as a principal residence under an existing rental agreement with the current tenants.

(11) The tenant fails to vacate a rental unit occupied under the terms of a temporary rental agreement entered into pursuant to the provisions of subsection 13.a.(7)(C), following expiration of the term of said temporary rental agreement, and following written notice of the availability of tenant's previous rental unit for re-occupancy by tenant (if the term of the rental agreement has expired by reason of the completion of repairs on the old rental unit), or of written notice to quit (if the term

of the rental agreement has expired by reason of the expiration of a period of ninety days).

b. A landlord's failure to specify good cause as listed above in subsections 1 through 11 of Section 13.a. in the notice of termination or the notice to quit and in the complaint for possession shall be a defense to any action for possession of a rental unit covered by the terms of this Ordinance.

c. In any action to recover possession of a rental unit covered by the terms of this Ordinance, except an action to recover possession under subsection 13.a.(7), 13.a.(8) or 13.a.(11), a landlord shall allege, as to each rental unit on the property, substantial compliance as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession with the implied warranty of habitability and compliance as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession with Sections 10 (Rent Ceiling) and 8 (Rent Registration) of this Ordinance.

d. The landlord shall file with the Board a copy of any notice of termination, notice to quit, and/or summons and complaint, within ten (10) days after the tenant has been served with such notice or summons and complaint.

Supreme Court, U.S.
FILED
JAN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-876

In The
Supreme Court of the United States
October Term, 1985

JON A. VICARS,

Petitioner,

v.

THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

This case pits the policies of the City of Berkeley which regulate rents and rental practices against an individual's aversion to such regulation based upon his economic and political interests.

Petitioner seeks to test the validity of the "Good Cause for Eviction" procedures of the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance, N.S.-5261 (hereafter referred to as the Ordinance) by means of a writ of certiorari for review of a dismissal of his state court unlawful detainer action.

Real Parties in Interest, the defendants in the underlying unlawful detainer action, herein advance a variety of reasons why the instant petition should be denied. At the outset, real parties note the sparse record which accompanies the petition.

The case comes before this Court on the pleadings because petitioner has chosen to present his claim through the vehicle of an unlawful detainer action rather than through his pending state court action against the City of Berkeley. Thus, there is nothing in the record which demonstrates that petitioner is unable to enjoy a fair rate of return on his investment. There is nothing in the record to show that the petitioner is unable to delegate to others those landlordly tasks which he finds so personally repugnant. There is nothing in the record to indicate how the ordinance operates against this petitioner in a particularly draconian manner. The record merely demonstrates that petitioner came to own a building inhabited by tenants who had the right to possession of their units pursuant to rental agreements with either the petitioner or his prede-

cessor. Eviction controls were in effect at the time of the petitioner's commencement of ownership, and the attached complaint indicates that after he acquired ownership, the petitioner continued to let units as they became vacant.

The petition presents more in the way of a polemic against rent control than a serious discussion of any federal constitutional issue. The petition fails to distinguish the case at bar from recent cases raising similar issues. In both *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984) (appeal dis. 84-1168), and *Fresh Pond Shopping Center, Inc. v. Callahan*, 104 S. Ct. 218 (1983), this Court dismissed appeals for want of a substantial federal question.

Moreover, review in this case should be denied on grounds not reaching the merits of petitioner's constitutional contentions. First, petitioner fails to demonstrate exhaustion of his administrative remedies, rendering this controversy unjusticiable due to lack of ripeness. (Section III)

Second, petitioner's claims regarding his right to evict his tenants and go out of business are rendered wholly moot by the passage of recent California legislation which will give him this right before this case could reasonably be decided should review be granted. (Section IV)

Third, the procedural posture under which this petition arises provides ample grounds for denial. The underlying state court action was brought against the tenants of the property in unlawful detainer, a special summary statutory procedure. It is well established that such actions are strictly limited in nature. Adequate state grounds for

the decisions reached below exist on the simple procedural point that the litigation of the constitutional validity of the subject regulations is beyond the scope of the California unlawful detainer statute. (Section V)

Fourth, the pendency of a state court action against the City of Berkeley on the same claim provides grounds for federal court abstention based upon considerations of comity and the principle of exhaustion of adequate and available state court remedies at law. (Section VI)

REASONS FOR DENYING CERTIORARI

I. THIS CASE PRESENTS NO CONSTITUTIONAL ISSUE INVOLVING THE RIGHT TO WITHDRAW FROM AN OCCUPATION.

Petitioner Vicars has put forth the proposition that the Ordinance has abridged his constitutionally protected right to withdraw his personal time, abilities and energies from the occupation of providing rental housing.

The Ordinance, however, lacks any element of coercion which forces Vicars to personally remain in business against his will. He is free to delegate his responsibilities to a manager, withhold units as they become vacant, or sell the property and invest the proceeds elsewhere.

These are the reasonable alternatives available to the owner discussed by the California Supreme Court in *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984), (appeal dis. No. 84-1168).

Vicars does not wish to utilize any of these alternatives. Instead, he wishes to withdraw his units immediately because he objects to the requirements of the Ordinance for economic and political reasons. (Pet. for Cert., p. 9) In order to accomplish this purpose, petitioner attempted to remove all of the tenants simultaneously. Consequently, he found the ensuing unlawful detainer actions to be unenforceable as they were in violation of the eviction protection provisions of the ordinance.

While petitioner may find the local regulations distasteful, his personal and economic reasons for disliking rent control do not give rise to any more of a federal constitutional claim than the similar contentions which were advanced and rejected in *Nash, supra.*

II. THE REGULATIONS IMPOSED BY THE SUBJECT ORDINANCE DO NOT CONSTITUTE AN IMPERMISSIBLE TAKING OF PETITIONER'S PROPERTY.

Petitioner contends that the Ordinance mandates such a permanent physical invasion of his property that a taking has occurred without regard to the public interests which the regulations serve. Such a per se taking was found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Petitioner submits that *Loretto* is controlling here.

Real Parties, on the other hand, assert that any claim of a taking must be determined on its own merits based upon the societal importance of the interest being protected by the regulation and whether the ordinance bears a reasonable relationship to such a purpose. Such an ap-

proach was used in *Nash, supra,* and is the appropriate standard absent a clear indication on the record of a permanent physical invasion of the petitioner's property.

A. The Regulations in Question do not Create such a Permanent Physical Invasion of Petitioner's Property to Constitute a Per Se Taking.

The record in the present case does not demonstrate the requisite permanent physical invasion of the petitioner's property so as to trigger the *Loretto* standard for a taking per se. Each of the tenants contracted either with the petitioner or the petitioner's predecessor and thereupon entered into rental agreements for the use and occupancy of their respective units. This is not a "physical invasion" within the meaning of *Loretto*. Nor is the tenants' occupancy permanent. The good cause for eviction section of the ordinance specifies ten different causes for eviction. It should also be noted that petitioner was presumptively aware of the subject regulations at the time of his purchase of the building in 1982 as they had been in force for two years. As a result, petitioner cannot show, nor has he even alleged, any interference with the "investment-backed expectations" which was noted as particularly significant in *Loretto*. *Id.*, at 418.

In fact, petitioner obtained exactly what he bargained for when he purchased the building: a ten unit property filled with tenants who were protected by the provisions of the eviction for good cause ordinance. The right to possession of the individual units had been, in every case, volitionally alienated by the owner of the property. No damage or [illegible]unition of the reversionary interest has been

demonstrated on the record. As such, the per se taking rule is not appropriately invoked in this case.

B. Even if the Ordinance Creates such a Permanent Physical Invasion of Petitioner's Property so as to Constitute a Per Se Taking, the Appropriate Remedy would be a Determination of the Proper Level of Compensation which should be Paid. The Ordinance Provides a Mechanism for Guaranteeing such Just Compensation, but Petitioner has Failed to Avail Himself of such Remedies.

The result of the holding in *Loretto* was not the removal of the cable facilities, but a remand to the state court so the proper level of compensation could be determined. By analogy, even if petitioner is suffering a permanent physical invasion which constitutes a taking per se, this would not necessarily invalidate the regulation so long as just compensation was received. The ordinance in question guarantees the owner a fair return on his investment. If the owner feels that he is not being adequately compensated, administrative remedies are available to ensure an appropriate rent increase. But this petitioner does not demonstrate that such recourse was sought prior to seeking judicial relief.

III. THE PETITIONER HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES WHICH ARE AVAILABLE TO HIM UNDER THE ORDINANCE.

Petitioner submits that Section 13 of the Ordinance constitutes a taking of his property in violation of the Fifth and Fourteenth Amendments. (Pet. for Cert., pp.

13-16) He also urges the court to find that his right to withdraw from the "occupation" of providing rental housing has been violated because the court below precluded him from showing that "the meager income allowed by the regulated rentals did not provide for hiring others in order to minimize his personal involvement." (Pet. for Cert., p. 12)

However, the same ordinance which petitioner seeks to challenge through this action provides a speedy administrative remedy to insure that the owner receives a fair return on investment.

The record in this case fails to disclose whether Vicars attempted to obtain a rent increase from the Rent Stabilization Board to compensate for any permanent physical invasion he was forced to suffer as a result of the ordinance. Nor does Vicars assert that he attempted to seek an adjustment for any other increase in maintenance or operating expenses necessary to maintain a fair rate of return.

As a result, this claim is not ripe under the authority of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, — U.S. —, 105 S. Ct. 3108 (1985). In that case, this Court held a taking claim premature because the respondent failed to seek relief through available administrative remedies. Vicars' failure to petition the Rent Stabilization Board for appropriate relief in the form of a petition for a rent increase is analogous to Hamilton Bank's failure to seek a variance before claiming that its property was taken without just compensation.

IV. THE LEGISLATIVE ENACTMENT OF CALIFORNIA GOVERNMENT CODE SECTIONS 7060, ET SEQ. RENDERS THIS PETITION MOOT.

The California Legislature has recently enacted a bill which gives landlords the right to withdraw their property from the rental housing market. (Stats. 1985, c. 1509, SB 505) This law is effective on July 1, 1986 and permits landlords to evict their tenants if they wish to go out of business notwithstanding local regulation.

In light of the foregoing, there is clearly no substantial federal question as the claim of petitioner is moot. Accordingly, review should be denied.

V. AN ACTION IN UNLAWFUL DETAINER IS NOT THE APPROPRIATE FORUM FOR CHALLENGING THE VALIDITY OF A MUNICIPAL REGULATORY SCHEME.

Petitioner has chosen an action in unlawful detainer as one of his procedural vehicles for challenging the Berkeley Ordinance. Unlawful detainer is a special statutory procedure, (California Code of Civil Procedure, Sections 1159, *et seq.*), within which the litigable issues are strictly limited. *Knowles v. Robinson* (1963) 60 Cal. 2d 620; *Gonzales v. Gem Properties, Inc.* (1974) 37 Cal. App. 3d 1029; *Mobil Oil Corp. v. Handley* (1978) 76 Cal. App. 3d 956. The procedural rights of an unlawful detainer defendant are extremely limited. The time to respond to service of process is five days instead of thirty, the action is entitled to preference in trial setting, and stay of execution pending appeal is not granted as a matter of right. This court has held that neither the limitation on litigable issues nor early trial provisions are violative of due proc-

ess or equal protection. *Lindsey v. Normet*, 405 U.S. 56 (1972).

Real Parties submit that the validity of an important municipal regulatory scheme cannot be properly litigated in such a summary procedure in a Municipal Court. Petitioner should properly bring an action in the nature of declaratory relief in Superior Court.

Nevertheless, petitioner asserts that review is appropriate because he "... was denied the opportunity to amend his pleading to plead the economic hardship imposed on him. (Pet. for Cert., p. 8) In his Application for Certification to the Court of Appeal (Pet. for Cert., Appendix F), petitioner argues that the subject ruling acted to deny him the right to trial on issues such as the saleability of the property, sufficiency of income to hire a management company and the rational relationship standard. (Appendix F-2) These issues are clearly beyond the scope of the summary unlawful detainer proceeding.

In accordance with the statutory scheme enacted in the State of California concerning unlawful detainer proceedings, further review should be denied.

VI. ABSTENTION IS APPROPRIATE IN THIS CASE BECAUSE OF THE PENDENCY OF AN ACTION AGAINST THE CITY OF BERKELEY IN STATE COURT BY THE PETITIONER BASED UPON THE SAME ISSUE AS RAISED HEREIN.

Currently pending in California state court is the action *Vicars v. City of Berkeley* (Alameda County Superior Court No. 582948-6), wherein the instant petitioner is seeking damages, injunctive and declaratory relief against the

City. The action is based on the grounds that the City is preventing him from exercising his constitutional right to go out of business.

This action raises the very issues which petitioner claims were improperly excluded from consideration in the underlying unlawful detainer action. (A copy of the complaint in that action is attached to the brief of Amicus City of Berkeley as Appendix A.) Real Parties concur with the City's contention that any ruling by this Court in the case at bar will have a substantial impact on the result of that state court action.

The pendency of the state court action provides further reason why the instant petition should be denied. Petitioner has an adequate remedy at law directly against the City of Berkeley for any damages he might suffer as a result of his inability to evict the tenants.

Moreover, abstention is proper in this case based upon developing standards of justiciability. In *Younger v. Harris,* 401 U.S. 37 (1971), this Court enumerated the principle that federal courts should abstain when a state criminal prosecution is pending. Several reasons were stated for such abstention including the notion of comity, and the existence of adequate remedies at law in the state proceeding. This Court also considered that a request for an injunction against the enforcement of a challenged statute is likely to require the court to engage in a "speculative and amorphous" line by line analysis of the statute, rather than deciding a concrete controversy.

This concept was applied to an action in declaratory relief challenging the constitutionality of a state criminal statute in *Samuels v. Mackell,* 401 U.S. 66 (1971), and to

state civil proceedings where a public entity is a party and important state interests are involved. *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); *Judice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982).

While petitioner is not technically seeking injunctive or declaratory relief, the effect of granting review herein will nave, as a practical matter, the same effect.

Particularly in light of the sparse record accompanying this petition, review should be denied based upon the foregoing principles.

CONCLUSION

For any and each of the above reasons, the Real Parties in Interest submit that Certiorari should be denied.

DATED: January 17, 1986

Respectfully submitted,

By /s/ SAMUEL E. TROSOW
Attorney for Real Parties in Interest

Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-876

In The

Supreme Court of the United States

October Term, 1985

JON A. VICARS,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 85-876

In The

Supreme Court of the United States

October Term, 1985

JON A. VICARS,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,

Respondent.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

BRIEFS IN OPPOSITION MISPERCEIVE THE ISSUES RAISED IN THE PETITION

The briefs in opposition of responding real parties in interest and of amicus, City of Berkeley, misperceive the issues presented in the petition and the context in which

they arise. Vicars does not ask this Court to rule that the city has violated his constitutional rights. Such a claim would be raised in a different form of action with the city as a defendant. Such an action has indeed been filed. *See* Appendix to Brief of City of Berkeley at App. 1-15. The issue in this case is whether the application to Vicars of the Berkeley ordinance by a state court in a proceeding against third parties would cause a violation of his constitutional rights such that the ordinance should not be applied to him.

It is Vicars' position that the record clearly shows that he sought to remove himself from the occupation of providing rental housing and on that basis sought to eject the tenants who wanted him to continue in that service and would not voluntarily leave the premises. Vicars believes that the scope of his constitutional right to withdraw from this occupation extends to these circumstances. He willingly conceded to the tenants the right to notice and an opportunity to be heard prior to eviction. However, once it is established as it is on this record that he is withdrawing from the occupation, the city ordinance cannot compel him to stay and provide an unwilling service.

If this Court concludes that Vicars' rights are less extensive and depend upon alternatives to the unlawful detainer process, such as those asserted by the California Supreme Court in *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984), *appeal dismissed*, 105 S. Ct. 174 (1985),[1] then Vicars' right to litigate those issues (which

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[1] The Court should recognize that there are significant differences between what Vicars is attempting to do and what Nash wished to do on the facts of his case. Petition for Certiorari at 11-12.

were defined by the California Supreme Court after this case was before the Appellate Department) was denied to him by the order of the lower court which sustained the demurrers without leave to amend. Appendix to Petition for Writ of Certiorari at C-2.

In either event this case presents the Court with the opportunity to define the scope of the constitutional liberty and associational interests at stake when an individual attempts to withdraw from a regulated occupation.

The briefs in opposition similarly misperceive the question of a taking of a property interest by a physical invasion. Under the facts of this case, Vicars does not challenge the authority of the city to regulate to some extent the relationship between him and his tenants including some manner of control over who could occupy the rental unit. Vicars' contention is that once he has decided to withdraw from the occupation and to have *no person* occupy the rental unit, it is a taking by physical invasion for the city to require Vicars to allow a beneficiary of the city's program to occupy the unit.[2]

Both of the issues presented in Vicars' petition were not before this Court when it previously considered similar ordinances. In those cases there existed "no requirement that the apartments in question be used for purposes which bring them under the Act." *Bowles v. Willingham*,

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[2] It must be recognized that acceptance of rent by the landlord from a person occupying the premises creates a presumption of a renewed tenancy. California Civil Code § 1945. Therefore, Vicars, who wishes to terminate the tenancies, must allow the city's beneficiaries to occupy the premises rent free.

321 U.S. 503, 517 (1944); *see also Block v. Hirsh*, 256 U.S. 135, 157 (1921). Moreover, it was also recognized that the constraints imposed on the property owner by those ordinances were limited to periods of short duration. *Bowles v. Willingham*, 321 U.S. at 513; *Block v. Hirsh*, 256 U.S. at 154, 157; *Brown Holding Co. v. Feldman*, 256 U.S. 170, 198 (1921). Therefore, the prior cases have not resolved the scope of the constitutional rights at issue in this case.

—o—

II

THE ENACTMENT OF NEW CALIFORNIA STATE STATUTES HAS NOT MOOTED THE ISSUES RAISED IN THE PETITION

Initially, it is worthy of note that the controversy underlying this petition continues unabated. The new state law does not take effect until July 1, 1986 (Appendix to Brief of City of Berkeley at App. 29), and the city has done nothing to modify its current ordinance. Moreover, the city makes no statement that it has any intention of modifying its current ordinance despite the pending new state law. A state statute authorizing Vicars to evict his tenants after the expiration of the term for which the property is let has been in existence since 1905.[3] Calif. Code of Civ. Proc. § 1161(1). Nonetheless, the California Supreme Court has ruled that this state statutory provision

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[3] All tenancies at issue in this case have expired. Appendix to Petition for Certiorari at E-2.

authorizing "recovery of possession does not preclude limitations on grounds for eviction for the purpose of enforcing a local rent control regulation." *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 707 (1984), *prob. juris. noted on other grounds*, 105 S. Ct. 2653 (1985). What interpretation will be given the new statute remains in doubt, particularly since the California Supreme Court has expressly withheld a decision on the question of whether a local ordinance adopted for the purpose of enforcing a local rent control regulation is a "municipal affair that overrides general state law" for charter cities, such as the City of Berkeley. *Id.* at 704.

Therefore, there is a substantial question as to whether the City of Berkeley will follow the new state statute and the city's silence on this point in its presentation to this Court hardly suggests that the controversy has been resolved.

Even if the city were someday to give full effect to the new state statute the relief available to Vicars is substantially less than the rights he asserts in this case. Not only may substantial fees be imposed (Appendix to Brief of City of Berkeley at App. 29), but also substantial rights relating to the property may be exacted including a ten-year right of first refusal to reoccupy a unit returned to the market. *Id.* at App. 24 (Section 7060.2(b)(2)). Moreover, Vicars may be subject to substantial administrative requirements, *id.* at App. 25-27 (Section 7060.4), and potential actual, exemplary, and punitive damages. *Id.* at App. 22, 24 (Sections 7060.2(a)(2) and (3), 7060.2(b)(2)).

Whether or not the statute may provide some limited assistance to beleaguered owners attempting to remove

their property from the rental market it clearly falls far short of the constitutional right asserted by Vicars to withdraw from the occupation.

———o———

III

UNDER CALIFORNIA LAW, CONSTITUTIONAL CLAIMS ARE PROPERLY LITIGATED IN AN UNLAWFUL DETAINER ACTION

"[California] Code of Civil Procedure section 86, subdivision (a)(4), clearly grants the municipal court jurisdiction over *all* aspects of an unlawful detainer action." *Vargas v. Municipal Court*, 22 Cal. 3d 902, 915 (1978) (emphasis in original). To comply with due process, this jurisdiction must include any "important factor in the State's determination to deprive an individual of his [claim to possession]." *Bell v. Burson*, 402 U.S. 535, 541 (1971).

Issues excluded from an unlawful detainer action are those which are "extrinsic to the narrow issue of possession, which the unlawful detainer procedure seeks speedily to resolve." *Green v. Superior Court*, 10 Cal. 3d 616, 633 (1974). Such exclusion does not include issues which "directly relate to the issue of possession." *Id.* Therefore Vicars' claim of a constitutional right to take possession was properly asserted in his unlawful detainer action. Moreover, Vicars' claim below was that the Berkeley ordinance could not prohibit the eviction of his tenants because to do so would thwart his federal constitutional rights. The California Supreme Court has expressly recognized that such claims of protection under federal law are within the

jurisdiction of the court in unlawful detainer actions stating, "The supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2) commands no less." *S. P. Growers Association v. Rodriguez*, 17 Cal. 3d 719, 726 (1976).

IV

THERE ARE NO STATE OR LOCAL PROCEEDINGS AVAILABLE WHEREBY VICARS COULD RECOVER JUST COMPENSATION FOR THE TAKING OF HIS PROPERTY

Initially it must be recognized that the simple straightforward issues raised by this case do not include a claim for just compensation against the city. Such a claim would clearly be outside the scope of an unlawful detainer action and would require a separate legal proceeding which Vicars has initiated. Appendix to Brief of City of Berkeley at App. 1-15. Vicars' claim in this action is limited to the assertion that the ordinance should not be applied to his circumstances because to do so would violate his constitutional rights by requiring him to turn over his property against his will to a beneficiary of the city's program without just compensation. This claim is ripe for review because California law does not allow a judicial claim for compensation. *See* Petition for Certiorari at 6. The suggestion by both the real parties in interest and the City of Berkeley that a proceeding before the city's rent stabilization board could result in an award of just compensation against the City of Berkeley is absurd.

First, the city is not a party in such a proceeding and no matter what is requested no award against the city can result.

Second, an order from the rent stabilization board does not result in an enforceable monetary award of any kind. The decision sets an "allowable rent increase" or a "maximum allowable rent." It does not require that any specific amount of money be paid over to the property owner. The effect of such a decision is limited to some manner of partial protection for the property owner against possible future charges by the city or the tenants that the owner has overcharged for future rents.

Third, the very purpose of the proceedings before the city's rent stabilization board is to *deny* the owner fair market value, which is the measure of just compensation for the property interest at stake. *United States v. Reynolds*, 397 U.S. 14, 16 (1970). The ordinance was adopted for the purpose of ensuring that the tenants and not the property owners received the benefit of any increases in the market value of the rented units.[4] If the rent stabilization board authorized Berkeley property owners to recover from the tenants an amount equal to just compensation for

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[4] Rent control is fundamentally different from other forms of property regulation. Other forms of regulation which restrict property use reduce the value of the property to any person who has an interest in use of the property. Rent control in contrast does not limit the established use of the property and therefore does not limit the value of the rental unit. It merely defines who will enjoy the value of that unit. The difference between the market value of the property as a rental unit, as measured by the price a willing renter would pay, and the price fixed by the ordinance for that unit is the measure of the value of the property interest transferred from the owner to the person occupying the unit.

the value of the use of the rental units, the board would violate the very purpose of the ordinance it is administering as well as ignoring the specific provisions of the ordinance limiting rent increases.[5]

———o———

CONCLUSION

The petition for certiorari presents to this Court on remarkably uncluttered facts two constitutional issues which have substantial effect on the important public policy area of the provision of rental housing. The legal standards governing the resolution of these issues have not been, but should be, clearly settled by this Court. The controversy over Vicars' right to withdraw from the occupation of providing rental housing continues unabated. If this Court does not grant certiorari Vicars will be left with a final judgment that he cannot evict his tenants for the purpose of going out of business. Regardless of any attempts to obtain relief from the City of Berkeley, the individuals occupying Mr. Vicars' units will continue to assert

---

[5] It is worthy of note that the rent stabilization board which supposedly will award Vicars just compensation accused him of going out of business as an inappropriate response to an order of that board directing him to *reduce* his rents. Appendix to Brief of City of Berkeley at App. 13.

their entitlement both to the use and enjoyment of Mr. Vicars' property and to his services as necessary to sustain their use and enjoyment. For these reasons the petition for certiorari should be granted.

DATED: January, 1986.

Respectfully submitted,

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No. 85-876

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent.

BRIEF AMICUS CURIAE OF THE CITY OF BERKELEY RENT STABILIZATION BOARD

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent.

BRIEF AMICUS CURIAE OF THE CITY OF BERKELEY RENT STABILIZATION BOARD

INTEREST OF AMICUS CURIAE

The City of Berkeley Rent Stabilization Board (hereinafter referred to as "the Board") is the administrative agency charged with implementation and enforcement of residential rent controls pursuant to Berkeley City Charter, Article XVII, Section 123. As such, it is interested in all judicial interpretations of the Rent Stabilization and Eviction for Good Cause Ordinance, Berkeley Municipal Code Chapter 13.76.

The Board, along with other defendants including the City of Berkeley, is a named defendant in an action now pending in Superior Court of the State of California in and for the County of Alameda which also arises out of the facts of this case. In this related matter, Vicars seeks damages for alleged violation of civil rights pursuant to 42 U.S.C. § 1983, inverse condemnation, injunctive and declaratory relief on the grounds that he has a constitutional right to evict his tenants and to go out of business. Vicars alleges that the Board, and others, are preventing him from exercising this right. (This action is entitled *Vicars v. City of Berkeley, et. al,* Alameda Superior Court No. 582948-6. A copy of the Complaint filed in that action is included as Appendix "A" to this brief.)[1]

Any ruling by this Court on the issues raised by Vicars will substantially impact the result in the pending trial court matter. Therefore, the Board has an interest in insuring that its position is presented to this Court at the earliest possible moment. The Board has appeared as amicus curiae in the courts below in the instant matter.

Counsel for petitioner and counsel for the real parties in interest (the tenants) have consented to the filing of this amicus brief. The letters of consent have been filed with the Court concurrently with the filing of this brief.

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1. Although demurrers by the tenant defendants have been sustained without leave to amend, the City and the Board answered the complaint and the action is still pending as to the municipal defendants.

REASONS FOR DENIAL OF CERTIORARI

By his petition, Vicars seeks review of California decisions upholding provisions of the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance which limit the grounds upon which tenants may be evicted. Vicars brought his rental property in 1982, some two years after the Ordinance was adopted by the voters and some four years after Berkeley rent controls were instituted in 1978. He soon became displeased with operating in a regulated environment and, by the end of 1983, decided to evict his tenants and go out of business. (Petition, p. 7)

This case presents no substantial federal question and the petition for writ of certiorari should be denied for two simple reasons. First, a recently enacted California statute accords petitioner the right to evict his tenants for the purpose of going out of business. Although this legislation was signed into law by the Governor of California on October 2, 1985, prior to the filing of the instant Petition, Vicars has failed to so advise the Court. The new statute moots the issues raised in the Petition. (A copy of the legislation is included as Appendix "B" to this brief.)

Moreover, petitioner's claims that his property rights have been taken without just compensation are not ripe under this Court's recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, — U.S. —, 105 S.Ct. 3108 (1985). Specifically, Vicars has failed to establish that he has sought a rent increase from the Berkeley Rent Stabilization Board to compensate for any allegedly impermissible taking which may result from the rents he is presently permitted to charge under rent control. He has also failed to demonstrate that the

state remedy provided by the newly enacted legislation which permits him to go out of business does not prevent or obviate any alleged taking which might be otherwise claimed. This further establishes that his claims are not yet ripe for review. Finally, his claim for damages for alleged inverse condemnation under the Civil Rights Act (42 U.S.C. § 1983) is currently pending against amicus, and others, in the California Superior Court, County of Alameda. Until this litigation is concluded, Vicars' attempt to obtain review of these claims by this Court is premature.

I

THE PETITION IS MOOT IN THAT CALIFORNIA LAW PERMITS PETITIONER TO EVICT HIS TENANTS FOR THE PURPOSE OF GOING OUT OF BUSINESS.

In its most recent session, the Legislature of the State of California enacted Senate Bill No. 505 which added Chapter 12.75 (Commencing with Section 7060) to Division 7 of Title 1 of the Government Code to accord residential landlords the right to evict their tenants for the purpose of withdrawing their property from the rental housing market. In *Nash v. City of Santa Monica,* 37 Cal. 3d 97 (1984), the California Supreme Court concluded that requiring a landlord to continue to rent to existing residential tenants as part of a rent control scheme violated no state or federal constitutional rights of the landlord. This Court denied review for want of a substantial federal question. *Nash, supra,* appeal dis. — U.S. — (March 18, 1985). Although amicus believes that the result in this case is controlled by *Nash,* the instant matter can be re-

solved without deciding the constitutional issues raised by petitioner.

In enacting the new statute, the California Legislature took pains to explain the reasons for its actions. California Government Code § 7060.7, in pertinent part, states:

> It is the intent of the Legislature in enacting this chapter to supersede any holding or portion of any holding in Nash v. City of Santa Monica, 37 Cal. 3d 97 to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business.

California Government Code § 7060(a) now provides:

> No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential rental real property to offer, or continue to offer, accommodations in the property for rent or lease.

Thus, notwithstanding *Nash, supra,* California law now permits eviction of tenants for the purpose of going out of business. Government Code Section 7060.2 through 7060.6 permit local entities to adopt certain regulatory measures to insure that the process is not abused and to provide that if the property is restored to the residential rental market, displaced tenants have the right of first refusal for a certain period of time.

The new statute would seem tailored to the needs and desires of landlords like Vicars who do not wish to participate in the regulated housing industry but who do not seek to otherwise change the use of their property. (Petition, p. 9). He will now be able to empty the entire build-

ing by eviction and, so long as he does not decide to re-enter the regulated market, be relieved of the duties of a landlord.

The relevant provisions of the statute become effective on July 1, 1986. (SB 505, Section 2). Amicus respectfully submits that by the time this case would be decided if this Court grants the petition, Vicars will be able to go out of business and carry out the evictions he desires. This not only moots the underlying issue of his right to go out of business, but also disposes of the question of how long he will be "forced" to remain a landlord. (See Petition, p. 7). Therefore, petitioner's claim of permanent physical invasion of his property—in violation of the rule announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)—is without merit and the Court need not reach the issue of whether or not eviction protections impermissibly infringe upon property rights. Amicus submits, however, that under *Nash, supra* and under *Fresh Pond Shopping Center v. Callahan*, — U.S. —, 104 S. Ct. 218 (1983) eviction controls, such as those contained in the Berkeley Rent Stabilization and Eviction for Good Cause Ordinance, would be fully sustainable even if SB 505 had not been enacted.

In light of the new statute, amicus submits that there is no substantial federal question and that certiorari should be denied because the issue is moot.

II

PETITIONER'S CLAIMS THAT HIS PROPERTY HAS BEEN TAKEN WITHOUT JUST COMPENSATION ARE NOT PROPERLY BEFORE THE COURT.

In addition to claiming a constitutional right to go out of business, Vicars, in effect, asserts that his rents are excessively low as a result of regulation, that he cannot profitably afford to hire a manager and that the value of his property has been reduced. (Petition, p. 6, 12). He urges that he was unable to present these arguments in the unlawful detainer proceeding wherein he sought to evict the tenants. However, the limited scope of the issues considered in unlawful detainer is intrinsic to the summary nature of the proceeding in California. *Knowles v. Robinson*, 60 Cal.2d 620, 625 (1963). This Court has specifically affirmed that summary procedures, affording only limited rights to the litigants, are constitutionally sufficient in eviction matters. *Lindsey v. Normet*, 405 U.S. 56, 66-73 (1972).

Thus, after selecting the unlawful detainer forum to raise the question of his constitutional right to go out of business, Vicars cannot object that it does not furnish all of the relief he desires. Significantly, Vicars has failed to advise this Court that he is already pursuing the California Superior Court matter, *Vicars v. City of Berkeley, supra*, which raises the very causes of action which he claims were not considered in the eviction case below. As previously noted, the other lawsuit alleges that Vicars has suffered inverse condemnation in violation of 42 U.S.C. § 1983 as a result of the fact that the Rent Stabilization and

Eviction for Good Cause Ordinance does not permit eviction for the purpose of going out of business. *See* Appendix A. The Superior Court action is the proper forum for resolution of these claims.

More significantly, however, it is clear that Vicar's taking claims are not ripe for review under this Court's recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank, supra.* That case requires that where a property owner claims to have suffered inverse condemnation, he or she must first utilize all agency procedures which might enable the agency to avoid or mitigate any alleged confiscation. *Id.* 105 S.Ct. at 1320-21.

Thus, just as the property owner in *Hamilton Bank, supra,* was required to seek available variances before it could claim that its property had been taken, Vicars must seek a rent increase from the Board (if he claims that his regulated rents are confiscatory) before he may pursue a federal taking claim. The record does not establish that he has done so. In fact, "[h]e simply decided for reasons both financial and personal to stop participating in the politically controlled housing market of the City of Berkeley and to withdraw his activities from the jurisdiction of a group of public officials whom he believed were abusing him." (Petition p. 7). Thus, he has failed to satisfy the *Hamilton Bank* requirements for raising a claim of taking.

Similarly, Vicars' taking claim is not ripe for review until he attempts to exercise the rights provided by SB 505 since this can obviate any alleged harm resulting from remaining in the rental housing business in a regulated environment. State action is not completed until all available state relief has been exhausted. Although petitioner

correctly points out that under *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979) aff'd. on other grounds 447 U.S. 255 (1980), the remedy for inverse condemnation under California law is invalidation of the action in question, not damages, the recently enacted statute concerning eviction for the purpose of going out of business provides Vicars with an additional remedy which he must pursue before raising a taking claim in this Court.

Thus, Vicars must first seek a rent increase from the Berkeley authorities before he can claim that his property is being taken as a result of rents which are alleged to be too low. He must also exercise the right created by the new statute to go out of business before he can claim that the eviction controls associated with rent stabilization impermissibly infringe on his property rights. Until he has done both of these his claims are not properly before this Court under the rule set forth in *Hamilton Bank, supra.*

CONCLUSION

This case presents no significant constitutional issues. California law already accords petitioner the specific right to go out of business by evicting his tenants, thus mooting the petition. Petitioner's claims of taking without just compensation are not yet ripe for review. No purpose would be served by granting certiorari in the instant case.

For each of the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January 17, 1986

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APPENDIX A

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SUPERIOR COURT OF CALIFORNIA,
IN AND FOR THE COUNTY OF ALAMEDA

No. 582948-6

JON A. VICARS,

Plaintiff,

vs.

CITY OF BERKELEY, CITY OF BERKELEY RENT STABILIZATION BOARD, JACQUELINE FOSTER, ROSS EPPLER, SUE BLAKE, PETER BENSON, HILARY J. JOHNSON, JULIA ANN CATO, SUSAN STONE, WENDY MORRIS, FRANCESCA SUZIO, MARY ANN BRIDGET LAWLEY, BRIAN D. AKERS, and DOES 1 through 50, inclusive,

Defendants.

COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS, INJUNCTIVE RELIEF, INVERSE CONDEMNATION, DECLARATORY RELIEF

(Filed March 4, 1984)

FIRST CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(FOR VIOLATION OF CIVIL RIGHTS, 42 U.S.C. 1983)

1. At all times herein mentioned, plaintiff, JON A. VICARS, was, and now is, a citizen of the United States and a resident of Alameda County, State of California.

2. Plaintiff is the owner of real property commonly known as 2431-2435 Jefferson Street in the City of Berkeley, County of Alameda, and has been the owner of said property since July 15, 1982.

3. Said real property consists of a total of ten (10) residential rental units. Plaintiff is in the business of providing residential rental housing at 2431-2435 Jefferson Street, in the City of Berkeley by renting said units to defendant tenants as hereinafter identified.

4. Defendant City of Berkeley, "City" at all times mentioned herein, has been and is now a municipal corporation in the County of Alameda, organized and existing under and by virtue of the laws of the State of California.

5. Defendant City of Berkeley Rent Stabilization Board, "Rent Board" at all times mentioned herein, has been and is now a local governmental agency organized and existing under the charter and ordinances of the City of Berkeley, most particularly ordinance No. 5467 N.S.

6. Defendant, JACQUELINE FOSTER, at all times mentioned herein, has been the "Program Chief" of the City of Berkeley Rent Stabilization Board.

7. Defendants, ROSS EPPLER, SUE BLAKE, PETER BENSON, HILARY J. JOHNSON, JULIA ANNE CATO, SUSAN STONE, WENDY MORRIS, FRANCESCA SUZIO, MARY ANN BRIDGET LAWLEY, BRIAN D. AKERS, ("Defendant tenants") at all times mentioned herein, rented from plaintiff the following units located at 2431-2435 Jefferson Street, in the City of Berkeley:

Apartment "A" ROSS EPPLER

Apartment "B" SUE BLAKE

Apartment "C" PETER BENSON

Apartment "D" HILARY J. JOHNSON

Apartment "E" JULIA ANN CATO

Apartment "F" SUSAN STONE

Apartment "G" WENDY MORRIS

Apartment "H" FRANCESCO SUZIO

Apartment "J" MARY ANN BRIDGET LAWLEY

Apartment "K" BRIAN D. AKERS

8. The true names and capacities of defendants DOES 1 through 50 are unknown to plaintiff at this time, and, therefore they are sued by such fictitious names. When their identities have been ascertained, plaintiff will seek leave to amend this complaint to insert their true names and capacities. Each of the fictitiously named defendants, 1 through 50, was, at all times mentioned herein, acting in co-operation with and as agent for the previously named defendants.

9. At all times hereinafter mentioned, defendant City, defendant Rent Board, Defendant Jacqueline Foster, and defendants ficticiously named, and each of them, in doing all of the things hereinafter alleged, acted under color of their authority as such, and under color of the statutes, regulations, customs and usages of the State of California, the City of Berkeley and the Rent Stabilization Board.

10. On or about October 15, 1983 plaintiff decided that he no longer wanted to engage in the business of providing residential housing in the City of Berkeley. Ac-

cordingly in November of 1983 he notified defendant tenants that their tenancies were terminated thirty days after service of said notice. At the end of the thirty day period defendant tenants did not surrender possession of the residential units to the plaintiff and continued to remain in possession of said units, thereby forcing plaintiff to remain in the business of providing residential housing.

11. On or about November 23, 1983 defendant Rent Board met with various defendant tenants offering them advice and assistance in preventing plaintiff from going out of business. Said Rent Board caused to be sent to plaintiff and defendant tenants a letter dated November 23, 1983 that states in part:

> "Dear Mr. Vicars:
>
> It has come to my attention that you seek to regain possession of rental units you own at the above address on the purported basis of exercising an alleged constitutional right to go out of the rental business. You should be aware that the good causes for eviction are specifically set forth in Berkeley Municipal Code Section 13.76.130. There is no provision to evict tenants because you wish to cease renting the units. You could, of course, cease to be a landlord by selling your property to another person . . . "

Photocopy of said letter is attached hereto as Exhibit "A".

12. Plaintiff was compelled on December 14, 1983 to to file action no. 52930 in the Berkeley-Albany Municipal Court for unlawful detainer. Defendant tenants demurred to said complaint in that good cause for eviction under defendant City of Berkeley ordinance No. 5467 N.S. did not exist. Defendant Rent Board through counsel from the City Attorney's Office, presented argument to the court

at the hearing on the demurrer. On January 17, 1984 the Municipal Court sustained the demurrer with prejudice in that plaintiff failed to allege good cause for eviction pursuant to the requirements of the Berkeley ordinance. That ruling is being appealed by the plaintiff.

13. Defendant City has demanded from plaintiff payment of monies to maintain a business license despite plaintiff notifying defendant City that he is no longer in the business of providing residential rental housing. Defendant City continues to make such demands of plaintiff.

14. Plaintiff is forced, and since October 15, 1983, has been forced against his will, to provide for and maintain residential tenants under color of law. Plaintiff has not consented to any of defendants' actions and has attempted to prevent such action by lawful means.

15. Defendant Rent Board, defendant tenants, and ficticiously named defendants have, through their actions, forced plaintiff into involuntary servitude thereby depriving him of rights guaranteed by the United States and California Constitutions, including equal protection and due process.

16. As a proximate result of defendants' actions, and each of them, plaintiff has been deprived of his liberty to exercise his constitutional right to go out of business and has been deprived of his property in an amount according to proof, but in excess of $15,000.00 in violation of the Civil Rights Act, 42 U.S.C. sec. 1983.

17. As a further proximate result of defendants' actions, and each of them, plaintiff has been subject to humiliation and indignity, preventing him from engaging in ac-

tivities and business of his choice and causing him to suffer great mental pain and suffering, all to his damage in the sum of three hundred thousand dollars ($300,000.00).

18. Defendants, and each of them, did the things herein alleged maliciously and oppressively. Plaintiff is therefore entitled to exemplary and punitive damages in the sum of three hundred thousand dollars ($300,000.00).

WHEREFORE, plaintiff prays relief as hereinafter set forth.

SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(FOR INJUNCTIVE RELIEF)

19. Plaintiff re-alleges and incorporates paragraphs 1 through 15 of the First Cause of Action herein, as though fully set forth.

20. Unless defendants are enjoined and restrained by this court, plaintiff will suffer irreparable injury.

21. Plaintiff is also informed and believes, and thereon alleges, that unless restrained and enjoined, defendants, and each of them, will continue to prevent plaintiff from going out of business and occupying his property, thereby preventing plaintiff from exercising his constitutional rights.

WHEREFORE, plaintiff prays relief as hereinafter set forth.

THIRD CAUSE OF ACTION
AGAINST CITY OF BERKELEY AND CITY
OF BERKELEY RENT STABILIZATION BOARD
(FOR INVERSE CONDEMNATION)

22. Plaintiff re-alleges and incorporates paragraphs 1 through 14 of the First Cause of Action herein as though fully set forth.

23. On or about November 23, 1983 defendant City and Rent Board by their actions in forcing plaintiff to remain in business of providing residential rental housing against his will and by allowing defendant tenants to remain in possession of the real property known as 2431-2435 Jefferson Street, as previously set forth, has caused a taking and damaging of the real property for which defendants City and Rent Board have not compensated plaintiff.

24. As a result of the above described taking and damaging of plaintiff's property, plaintiff has been damaged in the amount of three hundred thousand dollars ($300,000.00).

WHEREFORE plaintiff prays relief as hereinafter set forth.

FOURTH CAUSE OF ACTION
AGAINST CITY OF BERKELEY AND CITY
OF BERKELEY RENT STABILIZATION BOARD
(FOR DECLARATORY RELIEF)

25. Plaintiff re-alleges and incorporates paragraphs 1 through 15 of the First Cause of Action herein, as though fully set forth.

26. An actual controversy has arisen and now exists between plaintiff and defendants City and Rent Board

regarding section 13 of ordinance No. 5467 N.S. (photocopy attached hereto as Exhibit "B").

27. Plaintiff contends that:

(a) Said ordinance is invalid on its face in that it forces landlords, or persons similarly situated, to supply residential rental housing against their will, even if they choose to cease to supply residential rental housing; thereby denying rights guaranteed by the United States and California Constitutions including freedom from involuntary servitude, equal protection and due process.

(b) Said ordinance is invalid on its face in that it grants a life estate to a tenant contrary to California Civil Code sections 718, 761, et seq., 789 and other related sections.

(c) Said ordinance is invalid and unconstitutional as applied to plaintiff in that defendants, by preventing plaintiff from terminating tenancies of defendant tenants and by preventing plaintiff from going out of business, are denying the rights guaranteed to plaintiff by the United States and California Constitutions including freedom from involuntary servitude, equal protection, and due process.

28. Plaintiff is informed and believes, and thereon alleges that defendants dispute these contentions.

29. Plaintiff desires a judicial determination of the parties' respective rights and duties. Such a declaration is necessary and appropriate at this time because plaintiff has no other adequate remedy to prevent injury resulting from the deprivation of plaintiff's constitutional rights

caused by defendants' application of said ordinance according to its own opinion of its validity.

WHEREFORE, plaintiff prays relief as hereinafter set forth.

FIFTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(FOR APPOINTMENT OF A RECEIVER C.C.P. 564.8)

30. Plaintiff re-alleges and incorporates paragraphs 1 through 18 of the First Cause of Action, and paragraphs 22 through 24 of the Third Cause of Action, herein as though fully set forth.

31. Defendant tenants continue to occupy the property as previously set forth without paying rent. Defendants are thereby dissipating the proceeds of the property, and said property will be materially injured in that funds are not being generated for the normal expenses and upkeep of said property.

32. Plaintiff has suffered severe emotional distress as previously alleged. If plaintiff continues to remain in the business of providing rental housing he will suffer irreparable harm.

WHEREFORE, plaintiff prays as (sic) relief as hereinafter set forth.

PRAYER

Plaintiff requests the Court to grant the following relief:

ON THE FIRST CAUSE OF ACTION

1) A judgment declaring that the defendants violated plaintiff's civil rights within the meaning of 42 U.S.C. 1983;

2) That defendants be required to pay plaintiff damages according to proof;

3) That defendants be required to pay plaintiff damages for humiliation, indignity, mental pain and suffering, in the sum of three hundred thousand dollars ($300,000.00).

4) That defendants be required to pay plaintiff exemplary and punitive damages in the sum of three hundred thousand dollars ($300,000.00).

5) That defendants be required to pay plaintiff's attorney fees pursuant to section 1988 of title 42 of the United States Code;

6) That defendants be required to pay plaintiff the cost of suit herein incurred;

ON THE SECOND CAUSE OF ACTION

7) A permanent injunction enjoining defendants and all those acting on their behalf from interfering with plaintiff from going out of business and obtaining possession of his real property, or in any way interfering with plaintiff's constitutional rights.

ON THE THIRD CAUSE OF ACTION

8) For damages in the amount of $300,000.00 with interest thereon at the legal rate from the date of the damages;

9) For reasonable attorney's and appraisal fees according to proof;

10) For costs of suit herein incurred;

ON THE FOURTH CAUSE OF ACTION

11) A declaration that the City of Berkeley ordinance No. 5467 N.S. invalid and unconstitutional both on its face and as applied to plaintiff in that it denies plaintiff constitutional rights of freedom from involuntary servitude, equal protection and due process;

ON THE FIFTH CAUSE OF ACTION

12) That a receiver be appointed by this court to take over the management and control of said property and to collect the rents, issues, and profits therefrom and apply the same to repair and keep said property in good condition and to pay the necessary taxes and mortgage payments as they come due;

ON ALL CAUSES OF ACTION

13) For costs of suit and reasonable attorney's fees pursuant to Code of Civil Procedure sec. 1021.5 and 42 U.S.C. sec. 1988;

14) For the Court to appoint a receiver to operate and maintain the property pending litigation;

15) For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: March 13, 1984

Ciraolo & Ciraolo
By: /s/ Michael C. Ciraolo
Attorney for Plaintiff
JON A. VICARS

VERIFICATION

I, JON A. VICARS, am the plaintiff in this action.

I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 13, 1984, at Oakland, California.

/s/ Jon A. Vicars
Plaintiff

EXHIBIT A TO THE COMPLAINT

CITY OF BERKELEY

RENT STABILIZATION BOARD (415) 644-6128
2180 MILVIA STREET
BERKELEY, CALIFORNIA 94704

November 23, 1983

Mr. Jon A. Vicars
2406 Grant Street
Berkeley, CA 94703

Re: Various Thirty-Day Notices Served on Tenants at:
2435 Jefferson Street, Berkeley, California

Dear Mr. Vicars:

It has come to my attention that you seek to regain possession of rental units you own at the above address on the purported basis of exercising an alleged constitutional right to go out of the rental business. You should be aware

that the good causes for eviction are specifically set forth in Berkeley Municipal Code Section 13.76.130. There is no provision to evict tenants because you wish to cease renting the units. You could, of course, cease being a landlord by selling your property to another person.

Your dispute appears not to be with the tenants but with the provisions of the Rent Stabilization and Eviction for Good Cause Ordinance cited above. Your proper remedy is to pursue declaratory relief in Superior Court if you challenge the fact that the law does not permit evictions for the reasons set forth in your 30 day notice to the tenants.

I am also extremely concerned since your eviction attempts closely follow a Rent Board proceeding in which you were directed to reduce your rents and make substantial refunds to tenants. It is my understanding that all of the tenants who were parties to the petition have been served with eviction notices.

Although you are properly pursuing your administrative remedies of appeal of the Hearing Examiner's decision, your eviction efforts appear to be an attempt to circumvent the effect of the decision of the Examiner before the appeal can be decided. The facts seem to establish a clear case of retaliation against the tenants for exercise of their rights under the Ordinance. Section 13.76.170 of the Berkeley Municipal Code expressly prohibits such retaliation and Section 13.76.190 provides that violations of the Ordinance constitute a criminal offense.

In this instance, your proper remedy is the exercise of your administrative appeal rights and, thereafter, judicial review by way of a writ of mandate pursuant to Code of

Civil Procedure Section 1094.5. Eviction notices and the subsequent probable filing of unlawful detainer actions against the tenants are highly improper.

I consider your actions as not only an attempt to evade the effects of the Hearing Examiner's decision but a collateral attack on the jurisdiction of the Rent Stabilization Board in an inappropriate forum.

Unless you immediately withdraw all of the outstanding 30 day notices which purport to terminate tenancy on the ground that you wish to go out of business, I will be forced to recommend that the Board and City Attorney's Office take all appropriate steps to insure your compliance with the law. This could include the filing of various civil actions against you as well as intervention in any unlawful detainer litigation you bring against the tenants.

I sincerely hope that you will not make it necessary to take such action. If you pursue your challenges to the Ordinance through the proper channels as outlined above you will avoid much needless expense and litigation for all concerned. I strongly urge you to reconsider your present course of action in light of the information contained in this letter.

If you have any questions, please feel free to contact me at your earliest convenience.

Very truly yours,

/s/ Jacqueline Foster,
Program Chief

cc: All tenants at 2435 Jefferson
City Attorney

EXHIBIT B TO THE COMPLAINT

(This exhibit is not reproduced because the relevant provisions of the Rent Stabilization and Eviction for Good Cause Ordinance were included as Appendix H to the Petition for a Writ of Certiorari.

APPENDIX B

Senate Bill No. 505

CHAPTER 1509

An act to add Chapter 12.75 (commencing with Section 7060), to Division 7 of Title 1 of the Government Code, relating to real property.

[Approved by Governor October 2, 1985. Filed with Secretary of State October 2, 1985.]

LEGISLATIVE COUNSEL'S DIGEST

SB 505, Ellis. Public entities: real property.

(1) Existing law contains many provisions regulating the rental or lease of real property.

This bill would prohibit any public entity, as defined, from enacting legislation or to so administer legislation, to compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease.

This bill would provide that this provision does not prevent a public entity from enforcing any contract or agreement by which an owner of residential real property has agreed to offer the accommodations for rent or lease in consideration for a direct financial contribution, as defined, or, with respect to written contracts or agreements entered into prior to July 1, 1986, for any consideration; diminish or enhance, except as specified, any power which currently exists or which may hereafter exist in any public entity to grant or deny any entitlement to the use of real property, including, but not limited to, planning, zoning and subdivision map approvals; diminish or enhance

any power which currently exists or which may hereafter exist in any public entity to mitigate any adverse impact on certain displaced persons; supersede specified statutes relating to relocation assistance, fair employment and housing, unfair competition, civil rights, hiring of property, forcible entry and unlawful detainer, or community redevelopment; or relieve any party to a lease or rental agreement of the duty to perform any obligation under that lease or rental agreement.

This bill would provide that if a public entity, by valid exercise of its police power, has in effect any control or system of control on the price at which accommodations may be offered for rent or lease, that entity may provide that any accommodations which have been offered for rent or lease and which had been subject to that control or system of control at the time the accommodations were withdrawn from rent or lease shall be subject to certain specified provisions governing their subsequent rent or lease. The bill would authorize exemplary damages, as specified, for displacement of tenants or lessees.

This bill would provide that if a public entity determines to apply constraints, as specified, to a successor in interest of an owner who has withdrawn accommodations from rent or lease, the public entity shall record a specified notice with the county recorder.

This bill would further provide that any public entity, which, by a valid exercise of its police power, has in effect any control or system of control on the price at which accommodations are offered for rent or lease, may require that the owner notify the entity of an intention to with-

draw that property from rent or lease and record a copy of a specified memorandum with the county recorder, and require a certification with that notice that actions have been initiated as required by law to terminate any existing tenancies.

The bill would prescribe that failure of the owner to comply with the provisions of the bill is a defense in an unlawful detainer action.

(2) The provisions of the bill described in paragraph (1) above would become operative on July 1, 1986.

(3) This bill would declare that an invalid provision or application of its provisions is severable from other provisions or applications of the bill which can be given effect without the invalid provision or application.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would impose a state-mandated local program by requiring the county recorder to record a specified written memorandum in the grantor-grantee index.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Chapter 12.75 (commencing with Section 7060) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 12.75. RESIDENTIAL REAL PROPERTY

7060. (a) No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease.

(b) For the purposes of this chapter, "accommodations" means the following:

(1) The residential rental units in any detached physical structure containing four or more residential rental units.

(2) With respect to a detached physical structure containing three or fewer residential rental units, the residential rental units in that structure and in any other structure located on the same parcel of land, including any detached physical structure specified in paragraph (1).

7060.1. Notwithstanding Section 7060, nothing in this chapter does any of the following:

(a) Prevents a public entity from enforcing any contract or agreement by which an owner of residential real property has agreed to offer the accommolations for rent or lease in consideration for a direct financial contribution or, with respect to written contracts or agreements entered into prior to July 1, 1986, for any consideration. Any contract or agreement specified in this subdivision is not enforceable against a person who acquires title to the accommodations as a bona fide purchaser for value (or successors in interest thereof), unless (1) the purchaser at the time of acquiring title to the accommodations has

actual knowledge of the contract or agreement, or (2) a written memorandum of the contract or agreement which specifically describes the terms thereof and the affected real property, and which identifies the owner of the property, has been recorded with the county recorder prior to July 1, 1986, or not less than 30 days prior to transfer of title to the property to the purchaser. The county recorder shall index such a written memorandum in the grantor-grantee index.

As used in this subdivision, "direct financial contribution" includes contributions specified in Section 65916 and any form of interest rate subsidy or tax abatement provided to facilitate the acquisition or development of real property.

(b) Diminishes or enhances, except as specifically provided in Section 7060.2, any power which currently exists or which may hereafter exist in any public entity to grant or deny any entitlement to the use of real property, including, but not limited to, planning, zoning, and subdivision map approvals.

(c) (1) Diminishes or enhances any power which currently exists or which may hereafter exist in any public entity to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations in any residential hotel, as defined by Section 50519 of the Health and Safety Code, which is expressly reserved, or generally used, for occupancy by lower income households, as defined by Section 50079.5 of the Health and Safety Code.

(2) The reference to residential hotels in paragraph (1) is not intended by the Legislature to diminish or en-

hance any power which currently exists or which may hereafter exist in any public entity to require those same actions for other types of accommodations.

(d) Supersedes any provision of Chapter 16 (commencing with Section 7260) of this division, Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of this code, Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, Part 2 (commencing with Section 43) of Division 1 of the Civil Code, Title 5 (commencing with Section 1925) of Part 4 of Division 3 of the Civil Code, Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, or Division 24 (commencing with Section 33000) of the Health and Safety Code.

(e) Relieves any party to a lease or rental agreement of the duty to perform any obligation under that least or rental agreement.

7060.2. If a public entity, by valid exercise of its police power, has in effect any control or system of control on the price at which accommodations may be offered for rent or lease, that entity may, notwithstanding any provision of this chapter, provide by statute or ordinance, or by regulation as specified in Section 7060.5 that any accommodations which have been offered for rent or lease and which were subject to that control or system of control at the time the accommodations were withdrawn from rent or lease, shall be subject to the following:

(a) If the accommodations are offered again for rent or lease for residential purposes within one year of the date the accommodations were withdrawn from rent or lease, the following provisions shall govern:

(1) The accommodations shall be subject to any control on the price at which they may be offered in the manner and to the same extent as if the accommodations had not been withdrawn from rent or lease. This paragraph shall prevail over any conflicting provision of law authorizing the landlord to establish the rental rate upon the initial hiring of the accommodations.

(2) The owner of the accommodations shall be liable to any tenant or lessee who was displaced from the property by that action for actual damages which were the proximate result of that displacement, as defined and limited by the standards for compensation or payments applied to public entities with respect to rental dwellings by Sections 7262 and 7264, and punitive damages in an amount which does not exceed the contract rent for six months. Any action by a tenant or lessee pursuant to this paragraph shall be brought within two years of that displacement. However, nothing in this paragraph precludes a tenant from pursuing any alternative remedy available under the law.

(3) A public entity which has acted pursuant to this section may institute a civil proceeding against any owner who has again offered accommodations for rent or lease subject to this subdivision, for exemplary damages for displacement of tenants or lessees. The exemplary damages shall not exceed the contract rent for six months for any unit or units from which a tenant or lessee was displaced by withdrawal of the unit from rent or lease pursuant to this chapter. Any action by a public entity pursuant to this paragraph shall be brought within three years of the withdrawal of the accommodations from rent or lease.

(4) Any owner who offers accommodations again for rent or lease shall first offer the unit for rent or lease to the tenant or lessee displaced from that unit by the withdrawal pursuant to this chapter, if the tenant has advised the owner in writing within 30 days of the displacement of his or her desire to consider an offer to renew the tenancy and has furnished the owner with an address to which that offer is to be directed. That tenant, lessee, or former tenant or lessee may advise the owner at any time during the eligibility of a change of address to which an offer is to be directed.

If the owner again offers the accommodations for rent or lease pursuant to this subdivision, and the tenant or lessee has advised the owner pursuant to this subdivision of a desire to consider an offer to renew the tenancy, then the owner shall offer to reinstitute a rental agreement or lease on terms permitted by law to that displaced tenant or lessee.

This offer shall be deposited in the United States mail, by registered or certified mail with postage prepaid, addressed to the displaced tenant or lessee at the address furnished to the owner as provided in this subdivision, and shall describe the terms of the offer. The displaced tenant or lessee shall have 30 days from the deposit of the offer in the mail to accept by personal delivery of that acceptance or by deposit of the acceptance in the United States mail by registered or certified mail with postage prepaid.

(b) (1) If the accommodations are offered again for residential purposes more than one year after the date the accommodations were withdrawn from rent or lease, the

accommodations shall be subject to any control on the price at which they may be offered in the manner and to the same extent as if the accommodations had not been withdrawn from rent or lease, subject to any adjustments otherwise available under the system of control. This subdivision shall prevail over any conflicting provision of law authorizing the landlord to establish the rental rate upon the initial hiring of the accommodations.

(2) A public entity which has acted pursuant to this section, may require by statute or ordinance, or by regulation as specified in Section 7060.5, that an owner who offers accommodations again for rent or lease within a period not exceeding 10 years from the date on which they are withdrawn, and which are subject to this subdivision, shall first offer the unit to the tenant or lessee displaced from that unit by the withdrawal, if that tenant or lessee requests the offer in writing within 30 days after the owner has notified the public entity of an intention to offer the accommodations again for residential rent or lease pursuant to a requirement adopted by the public entity under subdivision (c) of Section 7060.4. The owner of the accommodations shall be liable to any tenant or lessee who was displaced by that action for failure to comply with this paragraph, for punitive damages in an amount which does not exceed the contract rent for six months.

(c) If the accommodations are demolished, and new accommodations are constructed on the same property, and offered for rent or lease within five years of the date the accommodations were withdrawn from rent or lease, the newly constructed accommodations shall be subject to any system of controls on the price at which they would be offered on the basis of a fair and reasonable return on the

newly constructed accommodations, notwithstanding any exemption from such a system of controls for newly constructed accommodations.

7060.3. If a public entity determines to apply constraints pursuant to Section 7060.2 to a successor in interest of an owner who has withdrawn accommodations from rent or lease, the public entity shall record a notice with the county recorder which shall specifically describe the real property where the accommodations are located and the dates applicable. The notice shall be indexed in the grantor-grantee index.

A person who acquires title to the real property subsequent to the date upon which the accommodations thereon have been withdrawn from rent or lease, as a bona fide purchaser for value, shall not be a successor in interest for the purposes of this chapter if the notice prescribed by this section has not been recorded with the county recorder at least one day before the transfer of title.

7060.4. (a) Any public entity which, by a valid exercise of its police power, has in effect any control or system of control on the price at which accommodations are offered for rent or lease, may require by statute or ordinance, or by regulation as specified in Section 7060.5, that the owner notify the entity of an intention to withdraw those accommodations from rent or lease and may require that the notice contain statements, under penalty of perjury, providing information on the number of accommodations, the address or location of those accommodations, the name or names of the tenants or lessees of the accommodations, and the rent applicable to each residential rental unit.

Information respecting the name or names of the tenants, the rent applicable to any residential unit, or the total number of accommodations, is confidential information and for purposes of this chapter shall be treated as confidential information by any public entity for purposes of the Information Practices Act of 1977, as contained in Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3 of the Civil Code. A public entity shall, to the extent required by the preceding sentence, be considered an "agency," as defined by subdivision (d) of Section 1798.3 of the Civil Code.

The statute, ordinance, or regulation of the public entity may require that the owner record with the county recorder a memorandum summarizing the provisions, other than the confidential provisions, of the notice in a form which shall be prescribed by the statute, ordinance, or regulation, and require a certification with that notice that actions have been initiated as required by law to terminate any existing tenancies. In that situation, the date on which the accommodations are withdrawn from rent or lease for purposes of this chapter is 60 days from the delivery in person or by first-class mail or nat notice to the public entity.

(b) The statute, ordinance, or regulation of the public entity adopted pursuant to subdivision (a) may also require the owner to notify any tenant or lessee displaced pursuant to this chapter that the public entity has been notified pursuant to subdivision (a), that the notice to the public entity specified the name and the amount of rent paid by the tenant or lessee as an occupant of the accom-

the notice to the public entity, together with a notice to the tenant or lessee of his or her rights under paragraph (4) of subdivision (a) of Section 7060.2.

(c) The statute, ordinance, or regulation of the public entity adopted pursuant to subdivision (a) may also require the owner to notify the public entity in writing of an intention to again offer the accommodations for rent or lease.

7060.5. The actions authorized by Sections 7060.2 and 7060.4 may be taken by regulation adopted after public notice and hearing by a public body of a public entity, if the members of the body have been elected by the voters of the public entity. The regulation shall be subject to referendum in the manner prescribed by law for the ordinances of the legislative body of the public entity except that:

(a) The decision to repeal the regulation or to submit it to the voters shall be made by the public body which adopted the regulation.

(b) The regulation shall become effective upon adoption by the public body of the public entity and shall remain in effect until a majority of the voters voting on the issue vote against the regulation, notwithstanding Section 4050, 4051, or 4055 of the Elections Code or any other law.

7060.6. If an owner seeks to displace a tenant or lessee from accommodations withdrawn from rent or lease pursuant to this chapter by an unlawful detainer proceeding, the tenant or lessee may appear and answer or demur pursuant to Section 1170 of the Code of Civil Procedure and may assert by way of defense that the owner has not complied with the applicable provisions of this chapter, or

statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter.

7060.7. It is the intent of the Legislature in enacting this chapter to supersede any holding or portion of any holding in Nash v. City of Santa Monica, 37 Cal. 3d 97 to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business. However, this act is not otherwise intended to do any of the following:

(1) Interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests.

(2) Override procedural protections designed to prevent abuse of the right to evict tenants.

(3) Permit an owner to withdraw from rent or lease less than all of the accommodations, as defined by paragraph (1) or (2) of subdivision (b) of Section 7060.

(4) Grant to any public entity any power which it does not possess independent of this chapter to control or establish a system of control on the price at which accommodations may be offered for rent or lease, or to diminish any such power which that public entity may possess, except as specifically provided in this chapter.

(5) Alter in any way either Section 65863.7 relating to the withdrawal of accommodations which comprise a mobilehome park from rent or lease or subdivision (f) of Section 798.56 of the Civil Code relating to a change of use of a mobilehome park.

SEC. 2. Section 1 of this act shall become operative on July 1, 1986.

SEC. 3. If any provision of Section 1 of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without invalid provision or application, and to this end the provisions of this act are severable.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.